TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 15.

HERMAN KECK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED JULY 7, 1895.

(16,330.)

(16,330.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 551.

HERMAN KECK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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1&2 In the District Court of the United States for the Eastern District of Pennsylvania.

Pleas before the honorable the judge of said court, of May sessions, 1896, No. 20.

It is thus contained:

THE UNITED STATES OF AMERICA
vs.
HERMAN KECK. } Indictment.

Be it remembered that at a district court of the United States in and for the eastern district of Pennsylvania, holden at Philadelphia on the eighteenth day of May, A. D. 1896, before the Honorable William Butler, judge of said court, by the oaths of James J. Franey, Wm. A. Bair, Samuel H. Clark, William Endebrock, Joseph Grieves, Wm. H. Haley, Edward B. Hubley, Albert N. Hughes, Frank McCullough, George W. Mars, John I. Miller, and William H. Taggert, and by the affirmations of William W. Atkinson, John H. Bergey, Charles Conely, James Dauman, W. Parker Fine, Richard Henderson, George S. Scypes, and Henry W. Stover,
3 good and lawful men of the said district, then and there impanelled and sworn or affirmed and charged to inquire for the said United States and for the body of the said district—

It is presented as follows:

(*Bill of Indictment.*)

In the District Court of the United States for the Eastern District of Pennsylvania, May Sessions, 1896. No. 20.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

The grand inquest of the United States of America, inquiring in and for the eastern district of Pennsylvania, upon their respective oaths and affirmations respectively do present that heretofore, to wit, upon the eleventh day of February, in the year of our Lord one thousand eight hundred and ninety, one Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid
4 and within the jurisdiction of this court, did knowingly, wilfully, and unlawfully import and bring into the United States and did assist in importing and bringing into the United States, to wit, into the port of Philadelphia, certain goods, wares, and merchandise, to wit, five hundred and sixty-three diamonds, of great value, to wit, of the value of ten thousand dollars, contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States, contrary to the form of the act of Congress in such case made and provided. and against the peace and dignity of the United States of America

2. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations do further present that afterwards, to wit, upon the day and year aforesaid, the said Herman

Keck, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, and unlawfully and with intent to defraud the revenue of
5 the United States smuggle and clandestinely introduce into the United States, to wit, into the port of Philadelphia, certain goods, wares, and merchandise, to wit, five hundred and sixty-three diamonds, of great value, to wit, of the value of ten thousand dollars, without paying and accounting for the duty imposed upon the said goods, wares, and merchandise by the provisions of the act of Congress in such case made and provided, which said goods, wares, and merchandise so smuggled and clandestinely introduced as aforesaid were subject to duty by law and should have been then and there invoiced, the said Herman Keck then and there well knowing that the duty due and payable upon the said goods, wares, and merchandise had not been paid and accounted for, and that the said goods, wares, and merchandise had not been invoiced as required by the provisions of the act of Congress in such case made and provided, with intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

6 3. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid do further present that afterwards, to wit, upon the day and year aforesaid, the said Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, wilfully, unlawfully, and fraudulently and with intent to defraud the revenue of the United States *did* import and bring into the United States, to wit, into the port of Philadelphia, certain goods, wares, and merchandise, to wit, five hundred and sixty-three diamonds, of great value, to wit, of the value of ten thousand dollars, contrary to law in that due entry was not made by the said Herman Keck of the said goods, wares, and merchandise, the said goods, wares, and merchandise being then and there clandestinely and with intent to defraud the revenue of the United States concealed by the said Herman Keck from the view and inspection of the officer of the United States duly appointed by law to examine the same, to wit, the custom-house inspector, and
7 by concealing the said goods, wares, and merchandise in a small box the said Herman Keck did not then and there particularize the contents of the said box, nor did the said Herman Keck mention the aforesaid goods, wares, and merchandise to the said officer, which said goods, wares, and merchandise were then and there subject to duty by law and should have been then and there invoiced and entered, with intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

JAMES M. BECK,
U. S. Attorney.

18 May, 1896.

8 (*Motion of the Defendant, by His Counsel, to Quash Indictment.*)

Presented and filed May 26th, 1896.

UNITED STATES OF AMERICA:

District Court of United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
vs.
HERMAN KECK. } No. 20.

Motion of defendant, Herman Keck, to quash indictment and each count therein.

Now comes the defendant, Herman Keck, by his counsel, and moves the court to quash the first count in the indictment herein for the following reasons, to wit:

First. Said count does not set forth facts sufficient to con-
9 stitute a crime against the United States of America or the laws and statutes of the United States of America.

Second. The said counts and the matters therein alleged do not constitute a crime against the United States of America or the laws and statutes of the United States of America.

Third. Said count does not specify and set forth how or in what respect or particular the alleged importation and bringing in were contrary to law.

Fourth. Said count does not specify and set forth how or in what respect or particular the alleged assisting in importation and bringing in were contrary to law.

Fifth. Said count is defective in this, to wit, that it is repugnant and inconsistent in this, to wit, it charges both the doing of certain acts and assisting therein.

Sixth. Said count is defective in this, to wit, it charges two counts in one count, to wit, knowingly, wilfully, and unlawfully importing and bringing into the United States as one crime, and assisting and importing and bringing into the United States as a second crime.

10 Seventh. Said count is defective in this, to wit, that it does not charge that the act of assisting was done fraudulently or knowingly.

Eighth. Said count is defective in this, to wit, it does not specify and set forth and allege whom it was this defendant is charged with having assisted.

The defendant, Herman Keck, by his counsel, also moves the court to quash the second count in the indictment herein for the following reasons, to wit:

First. Said count does not set forth facts sufficient to constitute a crime against the United States of America or the laws and statutes of the United States of America.

Second. Said counts and the matters therein alleged do not con-

stitute a crime against the United States of America or the laws and statutes of the United States of America.

Third. Said count is defective in this, to wit, it charges two crimes in one count, to wit, knowingly, wilfully, and unlawfully, and with intent to defraud the revenues of the United States, smuggle as one crime, and clandestinely introducing as another.

11 Fourth. Said count is defective in this, to wit, that it does not allege that the act of clandestinely introducing was done knowingly and wilfully.

The defendant, Herman Keck, by his counsel, also moves the court to quash the third count in the indictment herein for the following reasons, to wit:

First. Said count does not set forth facts sufficient to constitute a crime against the United States of America or the laws and statutes of the United States of America.

Second. Said count and the matters therein alleged do not constitute a crime against the United States of America or the laws and statutes of the United States of America.

Third. Said count is defective in that it does not specify and set forth how or in what respect the alleged importation and bringing in were contrary to law.

Fourth. Said count is defective in this, to wit, that the manner in which the alleged importation and bringing in took place *are* not contrary to the laws and statutes of the United States of America.

12 Fifth. Said count is defective in this, to wit, that the alleged manner of the alleged importation and bringing in — the alternative, to wit, in the entry of the goods, wares, and merchandise and the mentioning of the goods, wares, and merchandise.

Sixth. Said count is defective in this, that it charges four ways and manners in which the alleged importation and bringing in were contrary to law, to wit: First, that due entry was not made; second, clandestine concealment; third, failure to particularize the contents of the box; fourth, a failure to mention said goods, wares, and merchandise.

Seventh. Said count is defective in this, to wit, it is indefinite and uncertain in this, to wit, it does not specify the name of the custom-house inspector.

Wherefore defendant, Herman Keck, by his counsel, prays the court that the indictment herein and each and all of the counts of the said indictment herein may be quashed.

A. H. BODE,
FRANCIS B. JAMES,
Counsel for Defendant, Herman Keck.

A. H. BODE,
JAMES & JAMES,
Attorneys.

13 And thereupon, on the said 26th day of May, A. D. 1896, before the said the Honorable William Butler, judge as aforesaid, the said motion to quash the indictment aforesaid so as aforesaid made on behalf the said Herman Keck, defendant, is overruled.

14 *Demurrer of the Defendant by His Counsel.*

Presented and filed May 26, 1896.

UNITED STATES OF AMERICA:

District Court of the United States for Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
vs.
HERMAN KECK. } No. 20.

Demurrer of defendant, Herman Keck, to the indictment and each count therein.

Now comes the defendant, Herman Keck, in his own proper person, into court, and, having heard said indictment and the first count thereof read, says that the first count in said indictment and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that
15 he, the said Herman Keck, is not bound by the law of the land to answer the same; and this he is ready to verify. Wherefore, for want of sufficiency of the first count of said indictment in this behalf, the said Herman Keck prays judgment and that by the court he may be dismissed and discharged from the said premises in the said first count of said indictment specified.

And again now comes defendant, Herman Keck, in his own proper person, into court, and, having heard the said indictment and the second count thereof read, says that the said second count of said indictment and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that he, the said Herman Keck, is not bound by the law of the land to answer the same; and this he is ready to verify. Wherefore, for want of sufficiency of the second count of said indictment in this behalf, the said Herman Keck prays judgment and that by the court he may be dismissed and discharged from the said premises in the said second count of said indictment
16 specified.

And again now comes defendant, Herman Keck, in his own proper person, into court, and, having heard the said indictment and the third count thereof read, says that the said third count of said indictment and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that he, the said Herman Keck, is not bound by the law of the land to answer the same; and this he is ready to verify. Wherefore, for want of sufficiency of the third count of said indictment in this behalf the said Herman Keck prays judgment and that by the court

he may be dismissed and discharged from the said premises in the said third count of said indictment specified.

AUGUST H. BODE,
FRANCIS B. JAMES,
Counsel for Defendant, Herman Keck.

AUGUST H. BODE,
JAMES & JAMES,
Attorneys.

17 And thereupon, on the said 26th day of May, A. D. 1896, before the said the Honorable William Butler as aforesaid, the said demurrer so as aforesaid presented on behalf of the said Herman Keck, defendant, is overruled.

18 *Application of Defendant for a Dedimus Potestatem, with Affidavit in Support Thereof.*

Presented and filed May 26, 1896.

UNITED STATES OF AMERICA
vs.
HERMAN KECK. } May Sessions, 1896. No. 20.

Now comes the defendant, Herman Keck, and moves the court for a *dedimus potestatem* to take depositions at Amsterdam, Holland, and Antwerp, Belgium, in pursuance of section 866 of the Revised Statutes of the United States, and the testimony to be taken is necessary to his defence and is necessary in order to prevent a failure of justice.

AUGUST H. BODE,
FRANCIS B. JAMES,
Counsel for Herman Keck.

AUGUST H. BODE,
JAMES & JAMES,
Attorneys.

19 UNITED STATES OF AMERICA:

District Court of United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
vs.
HERMAN KECK. } May Sess., 1896. No. 20.

Affidavit of Herman Keck in Support of Application for Dedimus Potestatem.

STATE OF PENNSYLVANIA,
County and City of Philadelphia, Eastern District of Pennsylvania, } *ss:*

Herman Keck, being first duly sworn, on oath deposes and states

that he is not guilty as charged in the indictment, and has
20 duly entered his plea of not guilty, and that in order to obtain a fair and impartial trial it will be necessary for him to have issued a *dedimus potestatem* to take and procure the evidence of one Franz Von Hemmelrich and E. Michaux, residents of Antwerp, Belgium, and Moritz Sachs, a resident of Antwerp, Belgium, and Emanuel Sachs, a resident of Amsterdam, Holland, and Henry Hartog, a resident of Amsterdam, Holland, and sundry other persons whose names and residences this affiant cannot at present give, but who live in the neighborhood of Antwerp, Belgium, and Amsterdam, Holland. Affiant states that he expects to procure evidence in support of his defence by the aid of the said *dedimus potestatem* in substance as follows, to wit:

That Captain Loesewitz is in the business and employ of a line of steamers plying between Liverpool and Philadelphia, and is the same person charged with smuggling and clandestinely introducing and importing, contrary to law, a certain lot of cut diamonds on the steamer Rhynland, in connection with which this affiant is
21 charged at a date when affiant was hundreds of miles away at sea on the steamer Aller. Affiant expects to prove by witnesses that the said Captain Loesewitz was in the habit and practice to smuggle and regularly to make charges for his service to those who employed him to smuggle cut diamonds and other articles, and that on the occasion of the trip of the steamer Rhynland to America from Liverpool, the Rhynland arriving in Philadelphia on or about the 11th day of February last, the said Captain Loesewitz had been acting as agent for certain parties in New York and New Jersey to smuggle for them certain quantities of cut diamonds and jewelry; that the said Captain Loesewitz had agreed to perform the said services in consideration of a compensation to be paid him; that the said Captain Loesewitz had several packages of smuggled cut diamonds on board said ship, with the intention of landing them, the exact nature of which and the ownership thereof this affiant does not know, but believes he can fully establish that by depositions, which he seeks to take under the said *dedimus potestatem;* that the said Captain Loesewitz was the bearer of a number
22 of cut diamonds, and that said Captain Loesewitz carried on his previous trip to Europe from Philadelphia a written order from a New Jersey merchant for the purchase of diamonds, and which order is still in existence in Antwerp, Belgium, and which order this affiant believes he will be able to produce in evidence, and that the same is on the business card of said New Jersey merchant and in the handwriting of said Captain Loesewitz; that said diamonds are the diamonds described in the indictment, and that it will aid in the establishing of the innocence of this affiant to prove it; affiant further states that he expects to prove and establish the exact character and the nature of his business on the occasion of his visit to Amsterdam, Holland, and Antwerp, Belgium, and Hanau, Germany, in January, 1896, the character of the goods he purchased on that visit, and that the same were rough diamonds, pearls, and cut diamonds, and corresponded in amount and value with those

afterwards received through the United States custom-house at Cincinnati, Ohio, and New York city by the Herman Keck Mfg. Co. and the Coetermans Henricks Diamond Cut-
23 ting Company, excepting therefrom 39 and $\frac{1}{16}$ carats of goods resold in Europe, and that full duty was paid thereon to the Government of the United States. Affiant further expects to establish as bearing upon his defence in this case the full details as to the amount and value of said purchases of uncut and cut diamonds during the period of the year last past, so that the same can be identified with the invoices of uncut diamonds and cut diamonds received by said companies and upon which they duly paid duty to the Government of the United States at New York city and Cincinnati, Ohio. Affiant cannot now give the names of any other than the within-named witnesses, but fully expects to establish by other witnesses that on the occasion of the trip of the Rhynland, landing in Philadelphia on the 11th of February last, the said Captain Loesewitz was the agent for pay to bring valuable dutiable goods to be smuggled into America, and that the object and purpose of the delivery of said valuable and dutiable goods to the said Captain Loesewitz was known to a number of persons in said Antwerp, as can be shown by other testimony. Affiant further
24 states that the income of said Captain Loesewitz is but nine hundred dollars ($900.00) per year, and for a number of years while being so employed as captain of said vessel the average expenses of said captain have greatly exceeded his income, and compensations paid said captain for bringing such goods into this country affiant believes to have realized the said Captain Loesewitz a moderate fortune. Affiant further says that the said Moritz Sachs was the broker for the Herman Keck Manufacturing Company since the said The Herman Keck Manufacturing Company began importing diamonds direct from Europe about the year 1886 or 1887; that the said Sachs acted as broker from 1886 or 1887 to about May, 1895, when the affiant became one of the organizers of the Coetermans Henrichs Keck Diamond Cutting Company; that after said time said Herman Keck Manufacturing Company ceased to import cut diamonds less than about $\frac{1}{16}$ carat each in weight which could not be cut by the Coetermans Henrichs Keck Diamond Cutting Company. Affiant further states that after the incorporation of said company all im-
25 portations were made by the said companies of rough diamonds except two importations of cut diamonds on which duties were duly paid to the Government of the United States. Affiant further states that said Moritz Sachs, as broker, and Henry Hartog, as book-keeper, duly invoiced said goods purchased through their office and had them certified and forwarded in bond regularly in the due course of importing, except one purchase made about March 1st, 1895, duly invoiced through the Antwerp consulate of about that date, and another purchase February 5th, 1896, a part of which was shipped and regularly invoiced through the Antwerp consulate, as is shown in invoice of February 21st, 1896, upon which said purchases duties were paid at the custom-house at Cincinnati,

except on said 39 and $\frac{1}{16}$ carats resold in Europe. Affiant further expects to show that the amounts of the purchases sent from Europe tally exactly with the amounts he purchased there and received in the United States and on which duty was paid. Affiant further expects to prove that after the arrest of said Captain Loesewitz said
26 Captain Loesewitz returned to Europe, and while in Europe stated that the authorities in America and the New York competitors of affiant who were instigators of said prosecution said that they did not care to punish him, but that they were after Mr. Keck (meaning affiant) and Mr. Coetermans, and that they intended that he (said Captain Loesewitz) should go free.

Affiant further states that before Captain Loesewitz went into the service of the Red Star line said Captain Loesewitz was in the employ of the Cockerills steamship line and commanded a steamer of said company plying between Antwerp, Belgium, and Lisbon, Portugal; that about the year 1881 the custom officials of Portugal condemned the steamer of which he had command for smuggling 500 pounds of tobacco, which tobacco was found concealed in or about said Captain Loesewitz's cabin, and was compelled to pay 4,000 francs penalty, which money was furnished by the steamship's company in order to release the ship, and in order to escape conviction said captain procured said money to be paid; said captain, as affiant believes, left the country in order to escape an actual prosecution.

27 Afterwards the company filed a suit against the captain to recover the penalty, but, as he had no means, the company afterwards dismissed the suit. Affiant further states that this information as to said Captain Loesewitz's smuggling of said tobacco and the proceedings had thereon was only conveyed to affiant on the 15th day of May, 1896—too late for him to get certified copies of said proceedings. Affiant further states that he has been looking up the record of said Captain Loesewitz and says that if given an opportunity he believes he will fully establish that said Captain Loesewitz is a common and notorious smuggler and worthy of no credence and belief. His reputation for truth and veracity is bad; and further affiant saith not.

HERMAN KECK.

Sworn to before me and subscribed in my presence this 26th day of May, A. D. 1896, in open court.

W. W. CRAIG,
Dep'y Cl'k.

28 (*Answer on Behalf of the United States to the Application for a Dedimus Potestatem.*)

(Presented and Filed May 27th, 1896.)

UNITED STATES OF AMERICA:

In the District Court of the United States for the Eastern District of Pennsylvania, May Term, 1896.

UNITED STATES } *vs.* } No. 20.
HERMAN KECK. }

Answer of the United States to the petition for a *dedimus potestatem* of Herman Keck, defendant in the said case.

The United States, by James M. Beck, United States attorney, hereby makes answer to the application of Herman Keck for a *dedimus potestatem* in the above case.

The United States, by its attorney, says:

29 1. That the laws of the United States do not permit the issuance of a *dedimus potestatem* in a criminal case, and that the application should therefore be denied.

2. That the said application was made too late, in that it was not presented until the defendant was called to plead and the case was ready for trial. The United States suggests that if a *dedimus potestatem* is permissible in a criminal case that it, as any process to compel the attendance of witnesses or to procure their testimony, should have been issued before the case was ready for trial, so that the said trial should not be unduly delayed.

3. The facts set forth in the within affidavit are an attempt to discredit a witness for the Government, namely, Captain Loesewitz, whose name is on the back of the bill of indictment as such witness. The United States suggests that while it is in the power of the defendant to question the credibility of the said witness by asking him questions that if admitted would show his lack of credibility, yet that the defendant is bound by such answers and cannot

30 convert the trial of this case against Herman Keck into the trial of Captain Loesiwitz for alleged offenses committed at other times and places.

4. The United States further suggests that the application for a *dedimus*, if permissible in a criminal case, has not been made in this instance conformably to common usage, in that a previous written notice of the motion and rule for the *dedimus* was not served upon the plaintiff.

5. The United States further suggests that the said application, even if permissible in a criminal proceeding, has not been properly made, in that the interrogatories which it is proposed to ask the witnesses named in such application have not been filed in court or notice thereof served upon the district attorney.

6. The United States further suggests that the said Herman Keck was arrested on the 15th day of February, 1896, and was held

in bail to await the action of the grand jury on the 18th day of February, 1896; that the said Herman Keck has sufficient means to procure the attendance of the witnesses whose deposition
31 he desires to take at this court, and that there was ample time for him to procure such attendance.

The United States suggests, therefore, that in the absence of any evidence or suggestion that the said defendant is without means to procure the attendance of these witnesses at this court, or that the said witnesses have refused to attend, this application should be denied.

7. The United States further suggests that the issuance of this commission, if it be permissible in a criminal case, rests in the sound discretion of the court, and that to grant the application which is made and filed in the court when a case is called for trial would be to delay justice.

Wherefore the United States prays that the application for a *dedimus potestatem* be denied.

JAMES M. BECK,
U. S. Att'y.

John C. Gallen, being duly sworn according to law, deposes and says that he is a special agent of the Treasury Department; that he is credibly informed and believes that Herman Keck is a
32 diamond merchant of large financial means in Cincinnati, and that it was possible for him to procure the attendance of witnesses at this court whose deposition he now desires to take.

JOHN C. GALLEN.

Sworn and subscribed before me this 27th day of May, A. D. 1896, in open court.

W. W. CRAIG,
Dep'y Cl'k.

33 (*Refusal by the Court of the Application for a Dedimus Potestatem.*)

(Entered and filed May 27, 1896.)

In the District Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES *vs.* HERMAN KECK. } *Per Curiam.*

The application is refused on two grounds:

First. That the statute relied upon is not applicable to the criminal court nor to trials of causes therein.

Second. That if it was, the circumstances shown do not call for its application in this case at this time; that it does not appear that the presence of the witnesses could not have been procured by proper effort, and that if it did appear, it should be held
34 that the application comes too late; that it might have been made months ago and all delay in consequence of granting it avoided.

Whereupon counsel for defendant ask to have an exception noted; to which the court said: "An exception should be noted for what it is worth, but that in allowing it the court must not be understood as believing that this ruling is subject to review; that it does not so believe."

35 (*Pleas, Calling of Jury, and Verdict.*)

And thereupon he, the said Herman Keck, concerning the premises in the said indictment above specified and charged on him as above, being asked in what manner he would be acquitted thereof, says that he is not guilty thereof, and hereupon, for good or ill, he puts himself upon the country, and James M. Beck, Esq., attorney of the United States of America for the eastern district of Pennsylvania in this behalf, does the like.

And thereupon a jury, being called, come, to wit, W. Scott Hausman, John D. Nuttall, Edward N. Weyant, Nathan A. Confer, John A. Dever, Nicholas J. Drew, Alfred C. Grubb, Theo. H. Cowderman, John G. Devine, Wm. H. Haines, Elias J. Steiner, Jesse Bollinger, who, being chosen, tried, sworn, and affirmed to speak the truth of and upon the premises in the indictment aforesaid above specified, do say upon their oaths and affirmations that the said Herman Keck is guilty of the premises in the indictment aforesaid above specified in manner & form as he stands indicted.

36 (*Motions for a New Trial and in Arrest of Judgment and Reasons in Support thereof, Presented and Filed June 2nd, 1896.*

In the District Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES *vs.* HERMAN KECK. } No. 20. May Sess., 1896.

And now, to wit, June 2nd, 1896, the defendant, by Francis B. James and A. S. L. Shields, his attorneys, move the court for a rule to show cause why a new trial should not be granted in above cause and arrest of judgment and assigns the following reasons in support thereof:

First. Because the verdict is against the law.

Second. Because the verdict is against the evidence and the weight of the evidence.

37 Third. Because the learned judge erred in sustaining the objection to and overruling the following question asked by defendant's counsel on cross-examination of the witness first produced by the Government, Captain Frank Loesewitz:

Q. Wasn't she (the Concha) seized for having on board smuggled goods?

Weren't smuggled goods found right next to your cabin?

Fourth. Because the learned judge erred in overruling the objection made by the defendant's counsel to the following question asked

by the district attorney of the Government witness John C. Gallen on direct examination:

Q. Did the captain give you a description of the man who gave the diamonds to him?

Fifth. Because the learned judge erred in overruling the objection made by the defendant's counsel to the following questions asked by the district attorney of the Government witness John C. Gallen on direct examination:

Q. I want to ask you whether it was possible for him (Keck) to have seen that there was no address on that package at the time.

38 (Objected to. Objection overruled.)

Q. Was the package held by you at that time so that Keck could see it?

Sixth. The learned judge erred in sustaining the objection to the offer of defendant on the examination of Constant Van Reeth, a witness for defendant, as follows:

Mr. SHIELDS: I offer to prove that at least one year and during a period of one year prior — the 27th day of January, 1896, the name of F. Van Reeth frequently appeared in the public prints of Antwerp referred to by Captain Loesewitz in his testimony, and that it was well known through the public prints and by knowledge that the people of Antwerp had that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business.

Seventh. The learned judge erred in sustaining the objections to the following question of the defendant's counsel on the direct examination of Franz Van Reeth:

Q. What do you do with the rough?

(Objected to.)

Mr. SHIELDS: My purpose is to show that they deal wholly in rough diamonds.

39 That they cannot make any use of the cut diamonds in their business, and to follow that up by the people who handle their goods and the people who have seen them; that they never have any of this kind of material in their place at all, so as to show there was no motive on the part of these gentlemen to smuggle this stuff in.

(Objected to. Objection sustained.)

Eighth. The learned judge erred in refusing to affirm the defendant's first point, viz:

No. 1. The jury are instructed that there is insufficient evidence introduced in this case to make out the charges against the defendant, Herman Keck, and that they are therefore instructed to return a verdict of not guilty on both bills of indictment.

Ninth. The learned judge erred in refusing to affirm the defendant's second point, viz:

No. 2. The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the first count of each bill of indictment, and they are therefore in-

structed to return a verdict of not guilty as to the first count
40 of each indictment.

Tenth. The learned judge erred in refusing to affirm the defendant's third point, viz:

No. 3. The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the third count of each bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the third count of both bills of indictment.

Eleventh. The learned court erred in refusing to affirm the defendant's fourth point, viz:

No. 4. The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the second count of each bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the second counts of both bills of indictment.

Twelfth. The learned judge erred in refusing to affirm the defendant's fifth point, viz:

No. 5. The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing
41 into the United States the diamonds mentioned in the indictment. They are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same or putting the same on his manifest and delivering same in America without paying duty thereon, and put the same in his state-room on the steamer Rhyneland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen said Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged your verdict must be not guilty.

Thirteenth. The learned judge erred in refusing to affirm the defendant's sixth point, viz:

42 The jury are instructed that as the first count in each bill of indictment insufficiently states any crime against the laws of the United States said first count in each bill of indictment is to be entirely ignored by them and not considered.

Fourteenth. The learned judge erred in refusing to affirm the defendant's eight point, viz:

No. 8. The jury are instructed that the second count in each bill of indictment charges that the defendant, Herman Keck, smuggled and clandestinely introduced into the United States the diamonds mentioned in the indictment, but does not charge him with aiding and abetting therein, and, as to the section of the statute upon which this count is based, makes a distinction between the doing of an act and aiding and abetting therein; therefore your verdict

must be not guilty upon the second count of both bills of indictment.

Fifteenth. The learned judge erred in not affirming the defendant's tenth point unqualifiedly and in qualifying his answer to said point, viz:

No. 10. The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a pre-
43 ponderance of evidence of guilt; a preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt from the evidence that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with every hypothesis of innocence.

Answer. The court affirms the tenth point generally, but the meaning ascribed to it by the court is that the jury shall be fully convinced from a careful examination of all the testimony heard that the defendant is guilty of the smuggling charged, as testified to by Captain Loesewitz, and that if it is so convinced beyond room for reasonable doubt it will be justified in finding a verdict of guilty generally and should do so.

If it is not convinced, the defendant is entitled to an acquittal and should be acquitted.

Sixteenth. The learned judge erred in charging the jury as follows:

"It is sufficient to say in this respect that if the statements
44 made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bring-them here are true the defendant is guilty of the offence charged."

Seventeenth. Because the learned judge erred in refusing to grant the prayer of the defendant's petition for a *dedimus potestatem.*

A. S. L. SHIELDS,
FRANCIS B. JAMES,
Def't's Att'ys.

45 (*Refusal of New Trial, &c., and Sentence Imposed by the Court.*)

And thereupon, on the fourth day of June, A. D. 1896, arguments having been heard and due consideration having been given to the subject, the court is of opinion that the verdict aforesaid ought to stand and that a new trial ought not to be granted, but that judgment ought to — entered and given on said verdict. Whereupon the motion for a new trial and in arrest of judgment are overruled, reasons in support of same dismissed, and a new trial is refused.

And thereupon, on the ninth day of June, A. D. 1896, all and singular the premises being seen and by the court here fully understood, it is considered and adjudged that the defendant, Herman Keck, pay to the United States a fine of two hundred dollars; that

he be imprisoned and confined in the Eastern penitentiary of the Commonwealth of Pennsylvania for the term of one year; that he pay the costs of prosecution and stand committed until judgment be fully complied with, and that he be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of the said Commonwealth.

46 (*Bill of Exceptions. Filed May 9th*, 1896.)

UNITED STATES OF AMERICA:

United States District Court, Eastern District of Penna.

UNITED STATES OF AMERICA
vs.
HERMAN KECK. } Indictment No. 20. May Sessions, 1896.

Bill of exceptions.

Be it remembered that in the said May sessions, 1896, came the said United States into the said court and impleaded the said defendant, Herman Keck, in a certain indictment in which the said defendant, Herman Keck, was charged with an offence under sections 2865, 3082, and 2802 of the Revised Statutes of the United States of America, and upon the 20th day of May, 1896, at said sessions of said court, said defendant, Herman Keck, presented his applications to said court, asking and praying the court that a *dedimus potestatem* issue to take testimony and depositions at Amsterdam and Antwerp, Belgium, in pursuance of section 866 of the Revised Statutes of the United States, and the testimony
47 therein to be taken was necessary to his defence and necessary in order to prevent a failure of justice; which said application was duly marked filed on the docket of said court May 26th, 1896, and which said application is in words and figures as follows, to wit:

UNITED STATES OF AMERICA:

District Court of United States for Eastern District of Penna.

UNITED STATES OF AMERICA
vs.
HERMAN KECK.

Application for Defendant, Herman Keck, for Dedimus Potestatem.

Now comes the defendant, Herman Keck, and moves the court for a *dedimus potestatem* to take depositions at Amsterdam, Holland, and Antwerp, Belgium, in pursuance of section 866 of the Revised Statutes of the United States, and the testimony to be taken is necessary to his defence and is necessary to prevent a failure of justice.

A. H. BODE,
FRANCIS B. JAMES,
Counsel for Herman Keck.

And then and thereupon defendant, Herman Keck, at the time and place of making said application, duly presented to the court thereof the affidavit of the defendant, Herman Keck, which is in words and figures as follows, to wit:

48 UNITED STATES OF AMERICA:

In the District Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
vs.
HERMAN KECK. } No. 20. May Sess., 1896.

Affidavit of Herman Keck in Support of Application for Dedimus Potestatem.

STATE OF PENNSYLVANIA,
County and City of Philadelphia, Eastern District of Pennsylvania, } *ss:*

Herman Keck, being first duly sworn, on oath deposes and states that he is not guilty as charged in the indictment and has duly entered his plea as not guilty, and that in order to obtain a fair and impartial trial it will be necessary for him to have issued a *dedimus potestatem* to take and procure the evidence of one Franz Von Hemmelrich and E. Michauz, residents of Antwerp, Belgium, and Moritz Sachs, a resident of Antwerp, Belgium, and Emanuel Sachs, a resident of Amsterdam, Holland, and Henry Hartog, a resident of Amsterdam, Holland, and sundry other persons whose names and residences this affiant cannot at present give, but who live in the neighborhood of Antwerp, Belgium, and Amsterdam, Holland. Affiant states that he expects to procure evidence
49 in support of his defence by the aid of the said *dedimus potestatem*, in substance as follows, to wit:

That Captain Loesewitz is in the business and employ of a line of steamers plying between Liverpool and Philadelphia, and is the same person charged with smuggling and clandestinely introducing and importing, contrary to law, a certain lot of cut diamonds on the steamer "Rhynland," in connection with which this affiant is charged at a date when affiant was hundreds of miles away at sea on the steamer "Aller." Affiant expects to prove by witnesses that the said Captain Loesewitz was in the habit and practice to smuggle and regularly to make charges for his services to those who employed him to smuggle cut diamonds and other articles, and that on the occasion of the trip of the steamer "Rhynland" to America from Liverpool, the "Rhynland" arriving at Philadelphia on or about the 11th day of February last, the said Captain Loesewitz had been acting as agent for certain parties in New York and New Jersey to smuggle for them certain quantities of cut diamonds and jewelry; that the said Captain Loesewitz had agreed to perform the said services in consideration of a compensation to be paid him; that the said Captain Loesewitz had several packages of smuggled

cut diamonds on board said ship with the intention of landing them, the *the* exact nature of which and the ownership thereof this affiant does not know, but believes he can fully establish that by depositions which he seeks to take under the said *dedimus potestatem;* that the said Captain Loesewitz was the bearer of a number of cut diamonds, and that the said Captain Loesewitz carried on his
50 previous trip to Europe from Philadelphia a written order from a new Jersey merchant for the purchase of diamonds, and which order is still in existence in Antwerp, Belgium, and which order this affiant believes he will be able to produce in evidence, and that the same is on the business card of said New Jersey merchant and in the handwriting of said Captain Loesewitz; that the said diamonds are the diamonds described in the indictment, and that it will aid in the establishment of the innocence of this affiant to prove it. Affiant further states that he expects to prove and establish the exact character and the nature of his business on the occasion of his visit to Amsterdam, Holland, and Antwerp, Belgium, and Hanau, Germany, in January, 1896, the character of the goods he purchased on that visit, and that the same were rough diamonds, pearls, and cut diamonds, and corresponded in amount and value with those afterwards received through the United States custom-house at Cincinnati, Ohio, and New York city by the Herman Keck Mfg. Co. and the Coetermans Henricks Heck Diamond Cutting Company, excepting therefrom 39 and $\frac{1}{16}$ carats of goods resold in Europe, and that full duty was paid thereon to the Government of the United States. Affiant further expects to establish as bearing upon his defence in this case the full details as to the amount and value of said purchases of uncut diamonds during the period of the year last past, so that the same can be identified, with the invoices of uncut diamonds and cut diamonds received by said companies and upon which they duly paid duty to the Government of the United
51 States at New York city and Cincinnati, Ohio. Affiant cannot now give the names of any other than the within-named witnesses, but fully expects to establish by other witnesses that on the occasion of the trip of the "Rhynland," landing in Philadelphia on the 11th of February last, the said Captain Loesewitz was the agent for pay to bring valuable dutiable goods to be smuggled into America, and that the object and purpose of the delivery of said valuable and dutiable goods to the said Captain Loesewitz was known to a number of persons in said Antwerp, as can be shown by other testimony.

Affiant further states that the income of said Captain Loesewitz is but nine hundred dollars ($900.00) per year, and for a number of years, while being so employed as captain of said vessel, the average expenses of said captain have greatly exceeded his income, and compensation paid said captain for bringing such goods into this country affiant believes to have realized the said Captain Loesewitz a moderate fortune.

Affiant further states that the said Moritz Sachs was the broker for the Herman Keck Manufacturing Company since the said The

Herman Keck Manufacturing Company began importing diamonds direct from Europe, about the year 1886 to 1887; that the said Sachs acted as broker from 1886 or 1887 to about May, 1895, when the affiant became one of the organizers of the Coetermans Henrichs Keck Diamond Cutting Company; that after said time Herman Keck Manufacturing Company ceased to import cut diamonds
52 less than about $\frac{1}{16}$ carat each in weight, which could not be cut by the Coetermans Henrichs Keck Diamond Cutting Company. Affiant further states that after the incorporation of said company all importations were made by the said companies of rough diamonds, except two importations of cut diamonds, on which duties were duly paid to the Government of the United States. Affiant further states that said Moritz Sachs, as broker, and Henry Hartog, as book-keeper, duly invoiced said goods purchased through their office, and had them certified and forwarded in bond regularly in the due course of importing, except one purchase made about March 1st, 1895, duly invoiced through the Antwerp consulate of about that date, and another purchase, February 5th, 1896, a part of which was shipped and regularly invoiced through the Antwerp consulate, as is shown in invoice of February 21st, 1896 upon which said purchases duties were paid at the custom-house at Cincinnati, except on said 39 and $\frac{7}{16}$ carats resold in Europe. Affiant further expects to show that the amounts of the purchases sent from Europe tally exactly with the amounts he purchased there and received in the United States and on which duty was paid. Affiant further expects to prove that after the arrest of said Captain Loesewitz, said Captain Loesewitz returned to Europe, and while in Europe stated that the authorities in America and the New York competitors of affiant, who were instigators of said prosecution, said that they did not care to punish him, but that they were after Mr. Keck (meaning affiant) and Mr. Coetermans, and that they intended that he (said Captain Loesewitz) should go free.

53 Affiant further states that before Captain Loesewitz went into the service of the Red Star line said Captain Loesewitz was in the employ of the Cockerills steamship line, and commanded a steamer of said company plying between Antwerp, Belgium, and Lisbon, Portugal; that about the year 1881 the custom officials of Portugal condemned the steamer of which he had command for smuggling 500 pounds of tobacco, which tobacco was found concealed in or about said Captain Loesewitz's cabin, and was compelled to pay 4,000 francs penalty, which money was furnished by the steamship company in order to release the ship, and in order to escape conviction said captain procured said money to be paid; said captain, as affiant believes, left the company in order to escape an actual prosecution. Afterwards the company filed a suit against the captain to recover the penalty; but as he had then no means, the company afterwards dismissed the suit. Affiant further states that this information as to said Captain Loesewitz's smuggling of said tobacco and the proceedings had thereon was only conveyed to affiant on the 15th day of May, 1896, too late for him to get certified copies of said proceedings Affiant further states that he has

been looking up the record of said Captain Loesewitz, and says that if given an opportunity he believes he will fully establish that said Captain Loesewitz is a common and notorious smuggler and worthy of no credence and belief; his reputation for truth and veracity is bad, and further affiant saith not.

HERMAN KECK.

Sworn to before me and subscribed in my presence this 26th day of May, A. D. 1896, in open court.

W. W. CRAIG, *Dep'y Cl'k.*

54 And thereupon the court took under consideration said application and said affidavit in support thereof, and on consideration thereof overruled said application and denied said application; to which ruling of the court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the court.

Then and thereupon Hon. James M. Beck, United States district attorney for said district, asked time in which to file an answer to the application of Herman Keck for a *dedimus potestatem*, which application was granted, and said Hon. James M. Beck given until 10 o'clock a. m. of May 27th, 1896, — filed the same; and thereafter, to wit, at said ten o'clock a. m. on said 27th day of May, 1896, the said Hon. James M. Beck filed the said answer, which is in words and figures as follows, to wit:

UNITED STATES OF AMERICA:

In the District Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES *vs.* HERMAN KECK. } No. 20. May Term, 1896.

Answer of the United States to the Petition for a Dedimus Potestatem of Herman Keck, Defendant in the said Case.

The United States, by James M. Beck, United States attorney, hereby makes answer to the application of Herman Keck
55 for a *dedimus potestatem* in the above case.

The United States, by its attorney, says:

1. That the laws of the United States do not permit the issuance of a *dedimus potestatem* in a criminal case, and that the application should therefore be denied.

2. That the said application was made too late, in that it was not presented until the defendant was called to plead and the case was ready for trial. The United States suggests that if a *dedimus potestatem* is permissible in a criminal case, that it, as any process to compel the attendance of witnesses or to procure their testimony, should have been issued before the case was ready for trial, so that the said trial should not be unduly delayed.

3. The facts set forth in the within affidavit are an attempt to

discredit a witness for the Government, namely, Captain Loesewitz, whose name is on the back of the bill of indictment as such witness. The United States suggests that while it is in the power of the defendant to question the credibility of the said witness by asking him questions that, if admitted, would show his lack of credibility, yet that the defendant is bound by such answers and cannot convert the trial of this case against Herman Keck into the trial of Captain Loesewitz for alleged offences committed at other times and places.

4. The United States further suggests that the application for a dedimus, if permissible in a criminal case, has not been made in this instance conformably to common usage, in that a previous written notice of the motion and rule for the dedimus was not served
56 upon the plaintiff.

5. The United States further suggests that the said application, even if permissible in a criminal proceeding, has not been properly made, in that the interrogatories which it is proposed to ask the witnesses named in such application have not been filed in court or notice thereof served upon the district attorney.

6. The United States further suggests that the said Herman Keck was arrested on the fifteenth day of February, 1896, and was held in bail to await the action of the grand jury on the fifteenth day of February, 1896; that the said Herman Keck has sufficient means to procure the attendance of the witnesses whose depositions he desires to take at this court, and that there was ample time for him to procure such attendance. The United States suggests, therefore, that in the absence of any evidence or suggestion that the said defendant is without means to procure the attendance of these witnesses at this court, or that the said witnesses have refused to attend, this application should be denied.

7. The United States further suggests that the issuance of this commission, if it be permissible in a criminal case, rests in the sound discretion of the court, and that to grant the application which is made and filed in the court when a case is called for trial would be to delay justice.

Wherefore the United States prays that the application for a *dedimus potestatem* be denied.

JAMES M. BECK,
U. S. Attorney.

57 John C. Gallen, being duly sworn according to law, deposes and says that he is a special agent of the Treasury Department; that he is credibly informed and believes that Herman Keck is a diamond merchant of large financial means in Cincinnati, and that it was possible for him to procure the attendance of witnesses at this court, whose deposition he now desires to take.

JOHN C. GALLEN.

Sworn and subscribed before me this 27th day of May, A. D. 1896.

(Signed) W. W. CRAIG,
Dep'y Cl'k.

And this was all of the evidence offered for and against said application, and then and thereupon the court took under consideration said application and said affidavit in support thereof and said answer of the plaintiff, and on consideration thereof ruled as follows, to wit:

The application referred to yesterday is refused on two grounds:

First. That the statute relied upon is not applicable to the criminal court nor to trials of causes therein.

Second. That if it was the circumstances shown do not call for its application in this case at this time; that it does not appear that the presence of the witnesses could not have been procured by proper effort, and that if — did not appear it should be held that the application comes too late; that it might have been made months ago and all delay in consequence of granting it avoided.

58 Whereupon counsel for defendant ask to have an exception noted; to which the court said: "An exception should be noted for what it is worth, but that in allowing it the court must not be understood as believing that this ruling is subject to review; that it does not so believe."

Be it further remembered that after the proceedings aforesaid, at the same session, to wit, May sessions in 1896, came the United States into the said court and impleaded the said defendant, Herman Keck, in the indictment aforesaid, and to which indictment the said defendant, Herman Keck, pleaded "not guilty," and thereupon issue was joined between them.

And afterward, to wit, at said May sessions of said court, held in the district aforesaid, before the Hon. William Butler, judge of the said court, on the said 27th day of May, 1896, the aforesaid issue between the said parties came to be tried by a jury for that purpose, duly impanelled, *prout* list of jurors, and came as well the said United States, by Hon. James M. Beck, United States district attorney, and Hon. Harry K. Newitt, ass't United States district attorney, and the defendant, Herman Keck, by his attorneys, A. S. L. Shields, August H. Bode, and Francis B. James, and the jurors of the jury aforesaid, being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the said trial the witnesses for the United States were called and sworn and examined as follows, to wit:

59 FRANK LOESEWITZ, having been duly sworn, was examined as follows:

By Mr. BECK:

Q. Where do you reside?
A. Antwerp. I was born in Antwerp.
Q. Of what country are you a citizen?
A. I am a citizen of Belgium.
Q. What is your occupation?
A. Seafaring man—captain.

Q. Of what steamer?
A. The Rhynland, of the International Navigation Company.
Q. How long have you been captain of the Rhynland?
A. Since last year, in August.
Q. She plies between what ports?
A. Between Philadelphia and Liverpool.
Q. On last February, between what ports did she ply?
A. Between Philadelphia and Liverpool.
Q. Did you ever see the defendant, Herman Keck, before?
A. Never before I was in Antwerp.
Q. State in your own way the exact circumstances under which you first met the defendant, Herman Keck, and what took place.
A. On the 21st of January last, in the afternoon, I was in with a friend of mine, Von Hemmelrick.
Q. What was his full name?
A. Franz Von Hemmelrick.
Q. Where does he live?
A. In Antwerp.
Q. What is his business?
A. Jeweler.
60 Q. Is he a wholesale or a retail jeweler?
A. He has a store.
Q. Does he sell at wholesale or retail?
A. He sells jewelry; that's all I know.
Q. How long have you known him?
A. 25 or 26 years.
Q. You say you first met Herman Keck on the 27th of January, 1896, in company with Von Hemmelrick?
A. Yes, sir; in the afternoon I was in his house—that is, in Von Hemmelrick's house.
Q. What took place?
A. I was in Mr. Von Hemmelrick's house on the 27th, in the afternoon. He wasn't at home at that time. I had conversation with his lady—that is, with his wife.
Q. Were you there for any business purposes?
A. No, sir; I was just visiting him because he was a friend. Whenever I go to Antwerp I always go there.
Q. Was it a social call?
A. Yes, sir.
Q. State whether you had any idea when you went to his house that you were going to meet Herman Keck.
A. No, sir; I had never saw him and had never heard of him before then. Mr. Von Hemmelrick wasn't at home at that time. I stayed about a quarter or half an hour, talking with his wife. I was a mind to go out. At the moment I was going out Mr. Von Hemmelrick came in with Mr. Keck, and asked where I was going to. I said I was going home. He said, "You have time enough; come, let's have a glass of beer." We walked out of the house, and in the meantime he introduced me to Mr. Keck.
61 Q. How did he introduce you?

A. He said, "He's one of my friends—customers; we're going to take a glass of beer before you go."

Q. Did he mention the name?

A. Well, yes; but I didn't recollect it.

Q. He did mention the name?

A. I don't know that he did mention the name.

Q. He said, "This is my friend, a customer of mine"?

A. Yes, sir; "Let's go and have a glass of beer."

Q. Did he say where that friend came from?

A. No, sir.

Q. In what language did Von Hemmelrick speak to you?

A. He spoke in Flemish. We went to the Café Alsacienne, which is situated on the Place Vert, in Antwerp, and walked in and sat at a table, and each ordered a glass of beer and had a talk. At one time Mr. Von Hemmelrick went to his pocket and got a small package out and showed it to me. He says, "This package belongs to that gentleman here."

By the COURT:

Q. Was the defendant there at the time?

A. Yes, sir; he was there, sitting at the table.

By the DISTRICT ATTORNEY:

Q. Was that said in the hearing of Herman Keck?

A. Yes, sir; we sat close to one another.

Q. Was there anybody else present except you and Keck and Von Hemmelrick?

A. There were other people in the place, but none in our party.

Q. There was nobody else sitting at your table except those two gentlemen and yourself?

A. No, sir.

62 Q. Von Hemmelrick said, "This package belongs to my friend"?

A. Yes, sir; he said, "Will you oblige me to take that over to America? It belongs to him; it belongs to that gentleman; he's a a customer of mine: it doesn't contain any valuables."

Q. Did Keck say anything when that statement was made?

A. He said also that it did not contain any valuables.

Q. Did he deny that the package belonged to him when Von Hemmelrick said, "This package belongs to my friend"?

A. No, sir; seeing the package, I remarked that there was no address on it. I said, "Where shall I send it to?" I asked the stranger.

Q. You asked Mr. Keck?

A. Yes, sir; I asked him, "Where shall I send it to, sir?" After asking him that, he tore a piece of paper off a card laying on the table and put an address on it.

Q. Would you recognize that piece of paper again?

A. Oh, yes.

Q. Before handing you that paper, state, if you remember, what name was on it.

A. If I remember well, it was T. Van Reeth, 4th street, Cincinnati—21, I believe.

Q. Was that the number of the house?

A. No. 21 or 24; I am not sure about that.

Q. State your best recollection about it.

A. I think it was 21.

Q. I hand you a paper and ask you whether that is the paper that was handed to you by the defendant, Herman Keck?

A. Yes, sir; that is the paper.

Q. Do I understand you to say that he wrote that paper in your presence?

63 A. Yes, sir.

Q. From something that was lying on the table?

A. Yes, sir.

Q. Please look at the other side of that paper and tell me whether there is anything in the printing that confirms your recollection?

A. That represents a funeral card. That is the exact paper I had from Mr. Keck.

Q. Did you notice the print at the time on the other side?

A. No, sir.

Q. But you noticed it afterwards?

A. I only noticed it afterwards, because I put the package then in my pocket.

Q. Have you any doubt whatever that that is the paper?

A. There is no doubt about it that that is the paper.

Q. What else took place that day?

A. We only stayed in the café about a quarter of an hour, not longer. We walked out. We separated on the Place Vert.

Q. Was there anything else said at that time in regard to the package?

A. No, sir; nothing else.

Q. Was there anything said as to how you were to get it to Cincinnati?

A. Oh, yes; he told me afterwards to send it by Adams Express.

Q. Who told you afterwards?

A. Mr. Keck.

Q. What do you mean by afterwards? Was it after you separated?

A. After we came out of the café we separated on the Place Vert; then he told me.

Q. Before you separated?

64 A. Yes, sir; before we separated.

Q. State his exact words in regard to that, as near as you can recollect them.

A. His exact words were these—that he told me to send it by Adams Express.

Q. How did he come to make that remark?

A. Because I asked him the way to send it.

Q. Did he say who Van Reeth was?

A. No, sir; never.

Q. Did he at any time during that interview tell you what was in the package?

A. No, sir.

Q. But he did tell you there was nothing of value in it?

A. Yes, sir; that there was nothing of value. Mr. Van Hemmelrick said that also, both of them.

Q. Did they say the purpose that they had in sending that package to America?

A. No, sir.

Q. I hand you a package and ask you to look at it and tell me whether or not that is the package which was handed to you by Von Hemmelrick, with the statement that it belonged to the defendant, Herman Keck.

A. That is the package.

Q. Was it in the shape, with respect to the seals and binding, that you now see it?

A. It was in the same shape, only the paper got torn off. At that time the paper was right out and had those seals on and no writing on it.

Q. Did you ever see Herman Keck again before you sailed?

A. No, sir.

65 Q. When were you to sail?

A. I was only to Antwerp on a visit. My ship laid at Liverpool, and I left on the same night via Ostende and Dover for Liverpool. I arrived at Liverpool on Tuesday and sailed on Wednesday, the following day.

Q. Do you remember the date?

A. On the 29th, which was Wednesday.

Q. How long was that after you left Antwerp?

A. Two days after I left Antwerp.

Q. What day of the week was it that this interview took place in the Cafe Alsacienne?

A. Monday, the 27th of January.

Q. You sailed on the 29th?

A. Yes, sir.

Q. Did you see your friend Von Hemmelrick again before you sailed, after you separated in the Place Vert?

A. Yes, sir.

Q. Did you have any conversation with him about the package?

A. No, sir; I happened to see him when I left the station. I was with another friend.

Q. Was there anything said about this package?

A. No, sir; nothing.

Q. Did you break the seals of that package at any time?

A. No, sir.

Q. Did you know, until it was opened by the custom-house authorities, what was in that package?

A. No, sir; I hadn't the slightest idea what was in it.

Q. Was that package invoiced by you? Did you go before the United States consul and invoice it?

A. No, sir.

66 Q. Was it on your ship's manifest?
A. No, sir.
Q. (Manifest shown witness.) This is the ship's manifest, is it not?
A. Yes, sir.
A. As a matter of fact, you know it is not on there?
A. It is not on there, because I thought it didn't contain any valuables.
Q. What took place when you reached the port of Philadelphia?
A. When I reached the port of Philadelphia, after the passesgers were landed, two gentlemen entered my room and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, "Yes." I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally, on my part, I asked them who they were. They said they were Treasury agents, and said, "Captain, that's a package of diamonds you have got to be sent to Cincinnati," and if I didn't deliver it I would be arrested. After a while I went down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened.
Q. Who were the Treasury agents?
A. A gentleman sitting there, Mr. Gallen, and Mr. Cummins (identifying same).
Q. Did you give Mr. Gallen any description of Herman Keck, whom you had met in Antwerp?
A. Yes, sir; when I was up before the collector, Mr. Read, I gave a description.
Q. State, upon the solemnity of your oath, whether you
67 have any doubt that that is the man that you met in Antwerp.
A. No, sir; I have no doubt that that is the man.
Q. Please indicate who the man is, for there are a number of men here. Which is Keck?
A. The fourth gentleman sitting at that table.

By the COURT:

Q. With rather sandy-colored hair?
A. With a red moustache.

(Mr. Keck was here directed by the court to stand up.)

By the COURT:

Q. Is that the man you mean?
A. Yes, sir.

Cross-examination.

By Mr. SHIELDS:

Q. You have seen this same gentleman walking up and down the corridor for two or three days, have you not, outside?
A. Yes, sir; two or three days.

Q. Do you really mean to say that you did identify him? Was he not pointed out to you the very first day of the hearing, right in the entry? Didn't this gentleman here, Mr. Gallen, go past him and look at him and call your attention to him, and then did you not pass him two or three times and nod your head to Mr. Gallen that you recognized him? Didn't that occur?

A. I knew the man.

Q. Didn't that happen, as I have described it to you? Do you remember the day that Mr. Keck came here for the hearing?

A. Yes, sir; I remember that—the 18th of March.

Q. Do you remember that you were outside in the corridor
68 before the hearing took place?

A. Yes; I was.

Q. Did not Mr. Gallen pass the defendant, Mr. Keck, once or twice and point him out to you, and then did you not walk past him once or twice and nod back to Mr. Gallen that that was the man?

A. I passed by the man and I recognized him, and I said so.

Q. Didn't Mr. Gallen point him out to you?

A. No, sir.

Q. Did you have a talk with Mr. Gallen?

A. Yes, sir; afterwards.

Q. Did you before?

A. Of course, I spoke with Mr. Gallen before.

Q. Did not you and Mr. Gallen have a talk as to which was the man?

A. No, sir.

Q. Nothing was said?

A. No, sir.

Q. Why did you pass him two or three times if you recognized him so quickly?

A. When I recognized the man I went in again, and I said that man was there.

Q. Did you not pass him two or three times?

A. I went up and down once, maybe, or twice. I don't know.

Q. Did you not do so two or three times?

A. That may be.

Q. If you recognized him so quickly, what was the necessity of going by two or three times?

A. Because I was walking up and down.

Q. Is that the only explanation you can make for going past him two or three times?

69 A. I recognized the man; that is all. I walked up and down. I had nothing to do. It wasn't for that reason I passed by him.

Q. You walked past him two or three times?

A. Yes, sir.

Q. After you had, it was then that you stated that that was the man, was it not?

A. Yes, sir.

Q. If you recognized him as soon as you saw him, what was the

necessity for your going past him two or three times? Why did you do that?

A. My intention wasn't to pass three times there to know him, because I knew him from the first moment I saw him.

Q. You knew him?

A. Yes.

Q. You are positive that neither Mr. Gallen nor any other man pointed him out to you, before you walked past him, as Mr. Keck?

A. They didn't point him out, but they said Keck had arrived, because I asked if Mr. Keck had arrived.

Q. Who did you ask?

A. Mr. Gallen.

Q. When you asked him that question he replied, "Yes; there's the gentleman"?

A. When I came in, yes; I saw him. That's what I said. I saw the man.

Q. You have said that you asked Mr. Gallen if Keck had arrived.

A. Yes, sir.

Q. When you asked him that it was in the corridor, was it not?

A. No, sir; in the other room.

Q. The district attorney's room?

70 A. Yes, sir.

Q. When you asked him that question he pointed him out, did he not?

A. No, sir.

Q. What did he say?

A. "Mr. Keck has arrived."

Q. Was Mr. Keck there at that time?

A. When I came out he was in the corridor.

Q. He was not in the room?

A. No, sir.

Q. Are you sure of that?

A. Yes, sir.

Q. You had never seen this man but once, had you?

A. No, sir; not before in Antwerp.

Q. You had never seen him before?

A. No, sir; never.

Q. You were with him how long in Antwerp?

A. I should say about half an hour, maybe, more or less.

Q. Do you recall how he was dressed on that occasion in Antwerp?

A. He wore a black suit and a black hat—a soft or a Derby hat; I don't know which.

Q. You don't recall whether it was a soft or a Derby hat?

A. No, sir.

Q. Did he have any overcoat on?

A. I don't remember.

Q. Why cannot you give us some reasonable explanation why you can't remember whether he had an overcoat on or not?

A. He had a black suit on; I don't know whether he had an overcoat on or not.

Q. What enabled you to recognize him so quickly in Philadelphia, never having seen him before, and then only for
71 half an hour?

A. Only his features.

Q. Which features?

A. On his face.

Q. Do you mean the general appearance of the man?

A. And the general appearance of the man.

Q. Was it the general appearance?

A. The general appearance of the man.

Q. No particular marks or anything of that kind about him?

A. No, sir.

Q. You were caught with this material, were you not?

A. Yes, sir; having it on board.

Q. Who spoke to you first about it; was it Mr. Cummins or Mr. Gallen?

A. Mr. Gallen.

Q. Did Gallen go to the room with you?

A. Yes, sir; with me.

Q. Did you lock the door?

A. No, sir.

Q. Did you close the door?

A. That's what I can't remember.

Q. Don't you remember that you closed it and locked it?

A. No, sir; I never locked the door. I remember that I didn't lock the door.

Q. Why can't you remember whether you closed it or not, if you remember particularly that you did not lock it?

A. I didn't lock the door.

Q: State the reason that you remember one instance and not the other. You remember distinctly that you did not lock it?

A. Yes, sir.

72 Q. You don't remember whether you left it open or not?

A. No, sir.

Q. Do you remember what you did when you got in there?

A. Yes, sir.

Q. Did you throw anything out of the window?

A. No, sir.

Q. Are you quite sure of that?

A. Yes, sir.

Q. Have you not said that you did throw things out of the window?

A. I never said anything like that.

Q. Never, to anybody?

A. No, sir.

Q. As a fact, did you not?

A. No, sir.

Q. Did you not have other smuggled goods there?

A. No, sir.

Q. Of no kind?

A. No, sir.

Q. No packages?
A. No, sir.
Q. You had not carried anything of that kind over before for anybody?
A. Never.
Q. Do you know Mr. Hendrichson?
A. Yes, sir.
Q. Did you not have an order for him?
A. No, sir.
Q. What is his business?
A. He is a watch merchant and jeweler.
Q. You and he had been friendly for a long while?
A. I knew him for the last five or six years.
73 Q. Did you visit him?
A. Yes, sir.
Q. You visited him just before this last trip, did you not?
A. Before the last trip, I was there in the beginning of January.
Q. How many days did you sail after that visit?
A. I believe a few days afterwards.
Q. Did you not carry with you his card, with some writing on the back of it?
A. No, sir.
Q. Are you quite sure of that?
A. Yes, sir.
Q. Did you not have Mr. Hendrichson's business card with you?
A. I got that nearly a year ago.
Q. Did you not have that card on the last trip?
A. It may have been that I had it on board; yes, sir.
Q. Is it not a fact that it may be that you did have it at that time?
A. It may have been that I had a card at the time of Mr. Hendrichson.
Q. Was there not some writing on the back of it?
A. That I don't know.
Q. You would know if you carried the card for a year. Mr Hendrichson lives where?
A. In Newark, New Jersey.
Q. You had that card, you say, for a year?
A. Yes, sir; nearly a year. I don't say that card. I say I got his card. We may have changed cards; that is more than a year; I can't remember the exact time.
Q. What was the object of carrying his card abroad?
A. Because we exchange cards, you know. Of course, when I am at sea I carry it along.
74 Q. Was that the reason you were exchanging cards, that he gave you his business card?
A. We exchanged cards; that's all.
Q. He was your friend for five years before that?
A. Yes, sir.
Q. What was the object of exchanging cards?
A. Well, we were together, and we exchanged cards.

Q. Exchanged your business cards?
A. Yes, sir.
Q. What was the object of that?
A. As friends, exchanging one another's cards. There are more friends than us.
Q. Please recall whether or not there was not some writing on the back of that card that you have in your pocket.
A. No, sir.
Q. You had it on the 27th of January, did you not?
A. No, sir.
Q. When had you parted with it?
A. In the beginning of January. I can't remember the exact time when I saw Mr. Hendrichson.
Q. I ask you, when did you part with that card?
A. That was last year.
Q. You said you had it.

The COURT: No; he did not say that; he said he might have had it.

By Mr. SHIELDS:

Q. When was the last you remember having it?
A. I had that card about the end of last year.
Q. Did you not have it in January?
A. No, sir.
75 Q. Didn't I understand you to say that you parted with it in January—the early part of January?
A. No, sir.
Q. You did not say that you parted with that card in the early part of January?
A. No, sir.
Q. Didn't that card have an order for these very diamonds?
A. No, sir.
Q. Did it have any order on it?
A. No, sir.
Q. Did it have any writing on it?
A. No, sir.
Q. Did you not say a moment ago that you could not tell whether it had or not?

The COURT: He said before that it had not.

By Mr. SHIELDS:

Q. Do you now say that it had no writing on it?
A. No, sir; there was no writing on the card that I remember.
Q. When did you part with that card, as nearly as you can state?
A. I told you the end of last year.
Q. State the circumstances under which you parted with it and who you left it with.
A. I may have given it to Mr. Von Hemmelrick.

Q. Mr. Von Hemmelrick is the man that you got the diamonds from?

A. That is the one who introduced me to Mr. Keck, and told me that those diamonds belonged to Mr. Keck.

Q. It is the same man, Von Hemmelrick, is it not?

A. Yes, sir.

Q. Mr. Von Hemmelrick handed you the diamonds, did he not?

A. In that café he handed me the package, telling me that
76 there was nothing in it.

Q. Mr. Keck did not hand you anything, did he?

A. No, sir; he handed me a paper; yes; the address.

Q. But he did not hand you that inside, did he?

A. Inside the café.

Q. There were quite a number of people in the café?

A. Yes, sir.

Q. Was that openly and publicly, so that everybody in the café could see it?

A. Yes, sir.

Q. No concealment about it?

A. No, sir.

Q. Everybody in that room—to the number of how many—could see it?

A. I should say that there were thirty or forty people in the café at that time.

Q. You left Von Hemmelrick's house to go over to the café?

A. Yes, sir.

Q. There was nothing said about delivering diamonds and carrying them over to America there?

A. No, sir.

Q. They waited until they got into this public place; that is correct, is it not?

A. Yes, sir.

Q. Was the pen and ink convenient there, on the beer table?

A. Yes, sir.

Q. He did not have to call for it; it was there right on the table for him to write?

A. It was right there by Mr. Keck.

Q. On the same table that you had the beer? Is that right?

A. It was right on the same table we had the beer; yes.

77 Q. It did not occur to you to ask him at the time you were in the public saloon how you were to send this to Cincinnati?

A. No, sir; I didn't ask that in the café.

Q. How far had you gone in the street?

A. There is a square outside the café; we went about fifty feet in the middle of the square.

Q. You are quite sure as to the day this occurred?

A. On the 27th.

Q. On Monday?

A. Yes, sir; in the afternoon.

Q. Do you remember distinctly that that was the day of the week?

A. Yes, sir.

Q. Do you remember distinctly that it was the 27th of January?
A. Yes, sir.
Q. You don't remember the hour, do you?
A. No, sir; I don't remember the exact hour.
Q. Do you remember about what time—between what hours it was?
A. Between three and four o'clock—about between three and four o'clock.
Q. You are quite sure of that?
A. Yes, sir.
Q. It was not before three or after four?
A. It was between three and four.
Q. You are quite sure as to that, are you?
A. Yes, sir.
Q. Where did you put the package—in your pocket loose?
A. I put it loose in my pocket.
Q. Where did you put the paper?
A. Along with it—along with the box.
Q. Loose?
78 A. Along with the box.
Q. You never tied the paper to it?
A. No, sir.

By the DISTRICT ATTORNEY:

Q. Nothing was put in the box in your presence?
A. No, sir; it wasn't opened until we arrived here, by the Treasury agents.

By Mr. SHIELDS:

Q. You put that address loose in your pocket, without attaching it to the package in any way?
A. Yes, sir.
Q. When you got aboard the ship, where did you put the package?
A. In the drawer.
Q. Where did you put the paper?
A. Afterwards I put it in a little case.
Q. In a pocket-book, or something of that kind?
A. Yes, sir; in a pocket-book.

By the COURT:

Q. Why did you not put the paper containing the address on the package—fasten it there? Why did you keep them separately?
A. I kept that and put it afterwards with the package in another paper and wrote the address on myself.
Q. How is that?
A. I left off the address besides, and it was my minding to wrap that package in another paper when I arrived here and then put the address on it; I intended to do that.
Q. Why did you not fasten the address and the package together?
A. Because I put it in my pocket-book—that address. I didn't do that at the time.

By Mr. SHIELDS:

79 Q. You had other papers there in that card-case or pocket-book?
A. My cards.
Q. No other cards?
A. No. sir.
Q. No other papers?
A. No, sir.
Q. Nothing else but just that one piece of paper?
A. No, sir.
Q. What else was in that drawer? How many packages?
A. There was anything else in there—cards, everything.
Q. There were other little boxes, were there not?
A. No, sir.
Q. Do you mean that you had no packages and boxes in that drawer?
A. No, sir.
Q. Or in that state-room?
A. No, sir; only that package.
Q. You did not bring any other smuggled goods over but these?
A. No, sir.
Q. You are quite sure of that?
A. Yes, sir.
Q. You never did smuggle?
A. No, sir.
Q. You have never been accused of it?
A. No, sir.
Q. Do you swear to that?
A. Yes, sir.
Q. Did you sail on the Cockrell line?
A. Yes, sir.
Q. What steamship was that?
A. I sailed over about 18 years ago on the "Concha."
80 Q. When was the last time you sailed over?
A. 17 or 18 years ago.
Q. Are you quite sure that it has not been since that?
A. Yes, sir.
Q. Was the Concha the last vessel?
A. Yes, sir.
Q. Wasn't she seized while she was in your hands?

(Objected to unless connected with this defendant.)

Q. Wasn't she seized for having on board smuggled goods? Weren't smuggled goods found right next to your cabin?

(Objected to. Objection sustained.)

Q. Have you not been in the habit of bringing packages over for friends?
A. I have brought packages over—little presents that I thought weren't valuable—but I never omitted to go to the custom-house

officers and ask them if I might pass them on the dock; only things that contained no valuables.

Q. Did you go to the custom-house officers in this case before they went to you?

A. I had just arrived. I wasn't ashore.

Q. The passengers were on the wharf?

A. Yes, sir; the passengers were landed.

Q. You had made out your manifest, had you not?

A. The manifest is always made before we land.

Q. Where do the officers come aboard?

A. Alongside of the dock. Which officers do you mean?

Q. I mean the custom-house officers.

A. They came aboard on the river.

Q. At quarantine?

A. Yes, sir.

81 Q. How long had they been aboard before you had landed your passengers?

A. It may have been half an hour before we landed them or an hour; I don't know exactly.

Q. At that time the passengers were making declarations of what they had and swearing to them before the custom-house officers?

A. Yes, sir; they are always down in the saloon then.

Q. Making their declarations to the custom officers?

A. Yes, sir; but we are not present then.

Q. Did you permit the custom-house officers to leave that ship and go on the wharf without telling them that you had this package and ask them whether you could land it?

A. The passengers were on land; every one was on land. It wasn't a thing of importance.

Q. Did you not say that you always did ask them?

A. No, sir; I didn't say that.

Q. I understood you to say it.

A. You asked if I brought packages over before, and I said I always went on shore and asked the custom-house officers on the dock.

Q. Why should you not ask the other custom-house officers when they are on board the ship? Why wait until they get off on the wharf?

A. Because they never asked before that—little things.

Q. You have said that when you brought packages over before of no value that you always asked the custom-house officers if you could land them. Did you not say that?

A. Yes, sir; on the dock.

Q. Why do you wait until you get on the dock?

82 A. Because I didn't ask them before.

Q. Did you always wait until they get on the dock?

A. Yes; when I have something.

Q. Did you ask them on the dock this time or wait until they came to you?

A. No, sir; I didn't ask anything this time.

Q. You waited until the officers came to you, did you?

A. The officers didn't come to me; Mr. Gallen, the Treasury agent, came aboard.
Q. When he came he came from the wharf, did he not?
A. Yes, sir.
Q. He had been on the vessel before?
A. I don't know that.
Q. You saw the custom-house officers there?
A. Yes, sir; they are always on board when we arrive.
Q. You say you had never heard of Mr. Keck?
A. No, sir.
Q. You did not recall his name?
A. No, sir.
Q. The first time you knew of his name was when you saw him in the room here?
A. No, sir.
Q. When was the first time?
A. When Mr. Gallen came on board the ship.
Q. That was the first time you heard Mr. Keck's name, when Mr. Gallen came on board the ship?
A. Yes, sir; I didn't remember the name in Antwerp.

By the COURT:

Q. You had not carried the name away in your memory? At Antwerp you did not remember the name of the man?
A. That is what I said.
Q. At Antwerp you were introduced to Keck by your friends?
A. Yes, sir.
Q. Did you continue to remember his name or did it pass out of your mind?
A. It passed out of my mind.
Q. Until his name was mentioned to you on arriving?
A. Yes, sir.

By Mr. SHIELDS:

Q. So that practically that was the first moment that you had ever remembered the name of Keck, when Gallen mentioned it to you?
A. Yes, sir.
A. If he had mentioned Johnson it would have been the same thing, would it not?
A. I do not know.
Q. You would not have known any difference?
A. No, sir.
Q. All you know was the man when you saw him in the court-room or in the district attorney's office? It was the man's face?
A. It was the man's face.
Q. You did not identify him by his name at all, did you?
A. No; not by his name. I identified him by his face.
Q. When Mr. Gallen came up there and mentioned Mr. Keck's

name that was the first time that you remembered of hearing the name?

A. Of hearing it before; yes, sir.

Q. You had lived in Antwerp a great many years, had you not?

A. Always sailing.

Q. You had lived there?

A. Yes, sir; had lived there.

84 Q. Did you have a family?

A. No, sir; I am not a married man. I have got my father there.

Q. You lived at Antwerp, and that is your natural home?

A. Yes, sir; that is my home.

Q. You knew a great many people there?

A. Yes, sir; I was born there.

Q. Franz Van Reeth was a celebrated diamond-cutter in that city, was he not? He took a great many medals?

A. I don't know about that.

Q. Did you not read the Antwerp papers?

A. Sometimes; yes, sir.

Q. Do you not remember very frequently before that he had taken a number of medals?

A. I do not know about that; I did not follow that up; that was not in my line.

Q. You knew Van Reeth?

A. No, sir.

Q. You knew of him?

A. I don't know him.

Q. Do you mean to say you had never heard of Van Reeth in Antwerp?

A. That may be, but I don't know.

Q. You won't deny that you had heard of him?

A. It may be; I do not know.

By the DISTRICT ATTORNEY:

Q. Did you ever hear of Van Reeth?

A. I do not know; I might have read about that, but I don't recollect the name.

By Mr. SHIELDS:

Q. Did you ever read that paper (paper shown witness)?

A. Yes, sir; I can read it.

85 Q. Did you ever read it?

A. It might be that I read that.

Q. Did you not see Mr. Van Reeth's name there and a picture describing him?

A. I see it here.

Q. Did you not before this?

A. I do not recollect that.

Q. Try and recollect it.

A. I do not recollect it; so many papers I see. I am a year away from Antwerp. Those papers I seldom read.

Q. Look at the date of the paper.
A. 5th of March, 1895.
Q. Will you say on your oath you did not see the picture of this man and remembered him as being a celebrated diamond-cutter of that city?
A. I may have, but I do not recollect.

By the COURT:

Q. Have you any recollection of seeing that man's picture and reading about him? Have you any memory of it?
A. I might have.

By the DISTRICT ATTORNEY:

Q. Have you any recollection? Do you recall ever having seen the name or picture of Van Reeth, a diamond-cutter?
A. I may have seen it, but I do not recollect it.

By Mr. SHIELDS:

Q. Did you not read in the papers and was it not known all over Antwerp that this same Van Reeth, whose name is on that paper, had left for America and gone to Cincinnati to establish a diamond-cutting factory?
A. I heard about that; that many people went over; that many diamond-cutters went over.
The COURT: You are asked if you heard about this particular man. If you did, say so. Did you hear anything about Van Reeth coming over to this country to establish a place for diamond-cutting?
A. Yes, sir. I heard about it, but not that particular name.

By Mr. SHIELDS:

Q. What was the name?
A. Other people. I don't recollect the name.

The COURT: The question is whether you heard of this man Van Reeth coming over to this country to establish a place to cut diamonds. Not somebody else, but Van Reeth. Did you hear of that?
The WITNESS: I heard of people coming over.

By Mr. SHIELDS:

Q. Is not that a picture of him? (Paper shown witness.)
A. I do not know. I never saw him.

Redirect examination.

By the DISTRICT ATTORNEY:

Q. Did you ever hear the name of Van Reeth before it was written on that slip of paper by the defendant, Herman Keck, that you remember?
A. I remember that name.
Q. Do you remember ever having heard of the name Van Reeth before Keck wrote that upon this piece of paper?

A. There are many names like that.

Q. Do you recall that you ever heard that name?

A. I do not recollect.

Q. You do not recollect even having heard the name Van Reeth before Keck wrote it on paper?

87 A. No, sir.

Q. In the first place, in this conversation in the Café Alsacienne and when you crossed the Place Vert, did Keck talk in Flemish or English?

A. English.

Q. Is it an unusual thing for a restaurant in Antwerp to have pens and ink on the table?

A. There is always ink in restaurants.

Q. As matter of fact, in Antwerp is it not a fact that in the middle of the day people leave their work, government offices are closed, and people go into the restaurants and play cards and dominoes, and write their letters, &c.?

A. Yes, sir.

Q. What hours in the middle of the day are those?

A. From noon until three o'clock.

Q. And then they work in Antwerp from about three to seven?

A. Some people sits longer, too.

Q. While it is true, as you have said, that in the Café Alsacienne this slip of paper and box was handed so that anybody could hear, I want to ask you whether or not the conversation between you and Von Hemmelrick and Keck was sufficiently loud to be heard by the people in that café.

A. We spoke just the same as other people.

Q. If I recall the Café Alsacienne, there are different tables, are there not?

A. Yes, sir.

Q. Those tables are separated?

A. Yes, sir; close to one another.

Q. Could that conversation have been heard at any other table or not?

88 A. I think it could have been heard.

Q. Just before you get into port state whether or not you are busy.

A. Yes, sir.

Q. On this particular day were you as a captain very busy when you came into port?

A. Yes, sir. We are always on the bridge until the ship gets landed.

Q. As a captain you have considerable to do?

A. Yes, sir; we always stand on the bridge going up the river.

Q. What were you doing at the time Mr. Gallen came into your room?

A. I was filling my abstract of log.

Q. That is one of the things that has to be done at the end of a journey?

A. Yes, sir.

Q. After the passengers have been cleared by the custom-house fficers the captain can then have the opportunity to speak to them?
A. Yes, sir.
Q. Had all the passengers landed at that time?
A. Yes, sir.
Q. How long before had they all landed?
A. Maybe a half hour.
Q. State whether or not this card of Henrickson's had anything hatever to do with the delivery of this package to you by this on Hemmelrich?
A. Nothing.
Q. As matter of fact, have you ever knowingly brought any arcle of value into this country without paying the duties?
A. No, sir.
Q. As matter of fact, did you receive any consideration, inducement, or payment whatever for bringing this package to America?
A. No, sir.
Q. Was any promise made?
A. No, sir.
Q. As matter of fact, the duties were not paid upon this package?
A. No, sir.
Q. I understand that you were walking up and down the corridor t here awaiting the commissioner's hearing?
A. Yes, sir.
Q. Was your recognition of Keck by reason of anything whatr Gallen said to you?

(Objected to.)

Q. Please state whether or not when you recognized Keck in the rridor of this building Gallen had said or pointed out to you ck as the man.
A. No, sir.
Q. Had anybody?
A. No, sir.

Recross-examination.

By Mr. SHIELDS:

Q. You say that you were arrested by the officers, were you not?
A. No; I was not arrested. The officers found them in my posion.
Q. Were you not arrested by the officers and brought before the mmissioner?
A. Yes, sir.
Q. Were you not indicted for this very offense?
A. Yes, sir.
Q. And you are under indictment now?
A. Yes, sir.

By the DISTRICT ATTORNEY:

Q. Referring to the last question that has been asked you by counsel, I want to ask you whether any promise or inducement of immunity has been given to you by any one if you would
90 testify against Mr. Keck.

(Objected to.)

The COURT: You may ask him whether any promises have been made in consideration of his testifying against this man.

By the DISTRICT ATTORNEY:

Q. Has any promise been made to you as a consideration for testifying against Mr. Keck?

A. No, sir.

Q. Did I ever have any words with you until you were on the stand now?

A. No, sir; this is the first time we ever met.

By Mr. SHIELDS:

Q. But you have counsel, have you not, who have communicated with the district attorney?

A. I have a counsel.

Q. He told you it would be better to testify against Keck, did he not?

A. I tell the truth.

Q. Did not your counsel tell you it would be a good deal better?

A. The counsel told me to tell the truth.

Q. Did he not tell you it would be better for you to testify against Keck?

A. I told the truth; my counsel told me to tell the truth.

By the COURT:

Q. You know that you are under indictment; you know that you are charged with smuggling, do you not?

A. Yes, sir.

Q. Do you expect, by reason of anything that has been said to you, that your chances of getting off will be improved by testifying against Keck?

A. I think so because I have told the truth and was only made a tool of his. I did not know what was in the package; I never would have risked my position if I had.

91 By the DISTRICT ATTORNEY:

Q. As matter of fact, before you were arrested you told this story to the collector of the port?

A. Of course I told it to the collector of the port.

By Mr. SHIELDS:

Q. After you had had a talk with Gallen?

A. No, sir.

Q. Had you not had a talk with Gallen first?

A. On board.

92 JOHN C. GALLEN, having been duly sworn, was examined as follows:

By the DISTRICT ATTORNEY:

Q. What is your official position?

A. Special agent of the United States Treasury Department.

Q. Stationed where?

A. At Philadelphia.

Q. Please say exactly what you know in relation to the landing of the Rhineland and of the subsequent landing of the Aller.

A. Acting on information received that, at the instance of Herman Keck, the captain of the "Rhineland" had endeavored to smuggle diamonds, I met the steamship "Rhineland" upon her arrival here on the 11th day of last February, about four or five o'clock in the afternoon. I went aboard and examined the passenger list to see if Keck was on board or any one under that name, and I also examined the manifest to find if there was any diamonds. I found no one particularly on the passenger list corresponding to the name of Herman Keck, and no diamonds appeared on the manifest.

Q. When did the custom-house inspectors get on board the "Rhineland"?

A. The weather was very rough that day, and the boarding officers boarded just as she was coming into the dock. I then asked one of the custom inspectors to examine closely the baggage of one or two of the cabin passengers, whom I suspected, to ascertain whether they had any large quantity of jewelry, after which I went into the chart-room, where the captain was, with Special Agent Cummings. I spoke of the weather and other topics, and then I said, "Captain"—to whom I was unknown—"you have a package for the Coeterman Diamond Company—the Coeterman-
93 Keck Diamond Company, 24 West Fourth street, Cincinnati, Ohio?" I repeated the name of the company. He said, "No; I have no such package." I said, "I beg leave to differ with you," and, indicating with my fingers, I said, "You have a small package which you received while in Antwerp." He said, "I have a package for Van Reeth, of 21 West Fourth street, Cincinnati, Ohio, and I will give it to you if you have an order for it."

Q. At that time, I understand you to say, he did not know you were a Treasury agent?

A. No, sir; I was unknown.

Q. Had you ever met him before?

A. Never met him before to know him. I then said, "Captain, I have an order for them." He said, "Show me the order, and I will go and get the package." I replied, "Captain, I would like to see the package first before delivering the order, and I want to speak to you in private."

Q. Was there anything on your clothes like a badge or anything else to show what you were?

A. No, sir; none whatever. He was doing some writing at the time—I think finishing the log—and he asked me to wait until he

finished, and I said, "Certainly." After the lapse of about five minutes the captain arose and said, "You remain here, and I can go and get the package." As soon as the captain left the chart-room I quietly and unperceived by him followed him and saw him enter his room, and just as he emerged he had a package in his hand. As soon as I saw it I said, "Captain, that is the package I want." He said, "Where is your order?" I produced my card as United States Treasury agent. He refused to let me have it
94 until I was identified as a custom-house officer. A young man present at the conversation opposite the captain's room, who represented the steamship company—we agreed to go back to the chart-room, where I again insisted on getting this package, and this young man who represented the steamship company, who was present, advised the captain to give the package to me, which the captain did. I then searched thoroughly the captain's room and also other parts of the vessel, but did not find any other dutiable stuff, after which I went into the chart-room again and opened the package in the presence of the captain—broke the seal and opened the package.

Q. Did you have any conversation with the captain as to where he got this package? I mean before this?

A. No, sir; I did not have any conversation with him.

Q. You have told us all that took place up to the time that you broke the seals?

A. Substantially.

Q. I understand you to say that you told him that he had a package for the Coeterman-Keck Diamond Company and he denied it?

A. Yes, sir.

Q. The captain mentioned he had a package for Van Reeth?

A. Yes, sir; I broke the seals and opened the package in the presence of the captain and found it contained diamonds.

Q. Do you know how many diamonds?

A. We counted them the next day at my office and I think the number was 563.

Q. Were they cut or uncut diamonds?

A. The condition they are in now. I am not a judge of diamonds.

Q. Look at that box and tell me whether that is the box.
95 A. Yes, sir; that is the box which I seized.

Q. Was the box in that condition, with the exception of the tearing of the paper?

A. With the exception of the tearing of the paper. That paper was around the box and then there was another seal right in the corner.

Q. It was torn off in the tearing of the paper?

A. Yes, sir.

Q. Was there any address whatever upon the box?

A. No address on the box whatever.

Q. Was there any paper inside of the box?

A. There was a small paper containing twenty-eight diamonds and some writing on it.

Q. Tell me whether or not that is the paper?

(Paper shown witness.)

A. Yes, sir; that is the paper that contained the twenty-eight diamonds in the box. Those twenty-eight diamonds were separate.

Q. I understand these diamonds were all in the packages that they are now?

A. Yes, sir; but the twenty-eight were separate from the others.

Q. They were wrapped up?

A. Yes, sir.

Q. Is that the paper they were wrapped in when you opened the box?

A. They were wrapped in finer paper—tissue paper—and then placed in cotton. The twenty-eight were in a separate piece of paper in the same package.

Q. I understand you to say those are not the papers they were wrapped in?

A. I don't think so. It was very soft tissue paper. That one with the marks on contained the twenty-eight diamonds.

96 Q. The captain was present when the box was opened?

A. Yes, sir.

Q. Did you have any conversation with him as to where he got this package?

A. Not at that time.

By the COURT:

Q. Did he tell you anything about the diamonds?

A. Yes, sir; the day before he did.

Q. That day?

A. No, sir; he did not.

Q. He did not make any explanation?

A. No, sir.

Q. You asked him for the diamonds and you took them.

A. Yes, sir.

Q. Did you tell him why?

A. No, sir.

Q. Did you tell him by what authority?

A. Yes, sir; I told him I was a United States Treasury agent, and this package containing diamonds was not on the manifest.

Q. And you took them, therefore, as smuggled goods?

A. Yes, sir.

Q. You told him that?

A. Yes, sir.

Q. And he did not make any explanation?

A. He said he was no smuggler.

Q. Did he say anything else?

A. Not that day. I did not ask him anything.

By the DISTRICT ATTORNEY:

Q. Did he say whether he knew what was in the package?

A. He said he didn't know what was in the package.

97 Q. Did he say anything when the box was opened and the diamonds displayed?

A. He said he didn't know the contents of that package.

Q. What took place next day?

A. The next day he called at my office and I asked him if he had any explanation to make.

(Objected to.)

The COURT: His declarations cannot be used against the defendant. What this man said when the diamonds were first found upon him might be evidence as part of the *res gestæ*, and it would be safe to admit it, but what he said afterward certainly is not evidence against this defendant.

By the DISTRICT ATTORNEY:

Q. Did the captain give you a description of the man who gave the diamonds to him?

(Objected to. Objection overruled. Exception allowed for defendant.)

A. Yes, sir.

Q. What was the day when he gave you the description?

A. The day after I seized the diamonds.

Q. What was the description that the captain gave of the man whom he alleged gave him, the captain, the diamonds?

A. He described him as a man about the size of Collector Reed, not quite as stout, a small, reddish-brown mustache, small features, small eyes, and blonde complexion.

By the COURT:

Q. Did he name the man?

A. No, sir; he could not give me his name.

Q. That is, he did not remember it?

A. He did not remember it?

By the DISTRICT ATTORNEY:

Q. That was before you mentioned the name to him?

98 A. Yes, sir.

Q. Acting on that description and information, what did you do?

A. I went over to New York to await the arrival of the "Aller," which was due on the 14th of February last.

Q. From what port does the "Aller" sail?

A. I couldn't say whether it was Antwerp or Bremem; I don't know.

Q. When did the "Aller" get in?

A. She arrived about nine o'clock Friday evening.

Q. Tell us in your own way what took place on the "Aller."

A. I went down on the revenue cutter about three o'clock in the afternoon from New York and went down the bay to about Staten

island, a little below where we boarded the "Aller" about eight o'clock. I went into the dining-room and other parts of the vessel to see if I could discover a man answering to the description furnished me by the captain. After a short time I picked out a man corresponding to that description, who was in company with a young man.

Q. Who did you pick out on the captain's description?

A. That gentleman there (pointing to defendant).

Q. You mean the defendant, Herman Keck?

A. Yes, sir.

Q. Had you at that time any information whatever, except the information of the captain, to pick Herman Keck out?

A. No other description whatever.

Q. How many passengers were on the "Aller"?

A. I could not say. I should judge there would be about ninety, or about that. I would not be able to say.

Q. You mean ninety first-cabin passengers?

A. Yes, sir.

Q. She is a pretty large steamer, is she not?

99 A. Yes, sir; very large. One of the largest that sails from New York.

Q. Tell us, in your own way, what you did when you picked out the defendant.

A. I followed him around the steamer, and as he was coming out of the urinal into the corridor leading to the dining saloon I went up to him and said, "Is your name Keck?" He said, "Yes." I asked him, "Are you acquainted with Captain Loesewitz, of the steamship 'Rhineland'?" He said, "No." He said he was not acquainted with the captain. Then I said, "I have a package which I obtained from the captain to be delivered to a man named Keck, expecting to arrive at New York on the steamer 'Aller.'" He said, "I am not the man." I said, "Do you belong in Antwerp or the United States—Cincinnati?"

By the COURT:

Q. He said he was not the man?

A. Yes, sir; he said he was not the man. I said I had a package which I obtained from Captain Loesewitz, of the steamship "Rhineland," for a man named Keck, who is expected to arrive on that steamer. He said, "I am not the man." I asked him if he belonged to Cincinnati or Antwerp. He said, Cincinnati. Then I said, "You are not the man I am looking for."

By the DISTRICT ATTORNEY:

Q. Did he give his address in Cincinnati at the time?

A. I don't recollect.

Q. Was that all the conversation that took place at that particular time?

A. That is all that took place on board the "Aller."

Q. What took place next? Who was the young man who was with him?

100 A. I was informed his name was Van Reeth, a son of one of the managers of the Coeterman-Keck Diamond Company of Cincinnati, Ohio.

Q. They were traveling together?

A. Yes, sir.

Q. What next took place?

A. After Mr. Keck and his companion's baggage was examined by the custom officers of New York I took him to a room on the pier and said to him again, "Is your name Herman Keck?" He said, "Yes.", There were several custom-house officers present there.

Q. Are any of them here?

A. Yes, sir; Mr. Murray was present, Mr. Donohue, Mr. Brown, and Special Agent Cummings. He said, Yes. I asked him again if he was acquainted with Captain Loesewitz, of the steamship "Rhineland," and he said he was not. I said, "I received a package containing diamonds in the possession of the captain at Philadelphia on the 11th, and from the description furnished me, corresponding so closely to yourself, I will have to ask you to come over to Philadelphia on the next train and ascertain if the captain can identify you as the person." He said, "It would not pay me to be engaged in any business of this kind. We are worth $300,000." I said, "That is true. The captain may possibly want to throw the blame on you and relieve himself." He said, "Certainly, I will go with you to Philadelphia." I turned around to make preparation to take the next train. Before I finished Keck turned around and said, "I don't think I will go. I haven't been treated right here tonight." I said, "I am not responsible for that." He said, "I will insist on my rights. You will have to get the necessary papers to take me to Philadelphia."

101 Q. He said he would require the necessary legal papers before going to Philadelphia?

A. Yes, sir.

Q. Did you have any conversation with him as to who he was, what his business was, and where it was?

A. Yes, sir; I turned around then and said to him, "This package." I held it in my hand that way.

Q. Illustrate to the jury just how this incident happened.

Witness illustrated to the jury by holding box covered with his hand and stated, I held the package in that position in my hand and said to him, after he refused to go with me, I said, "Here is the package which belongs to your firm, the Coeterman-Keck Diamond Company of Cincinnati." He said, "There is no address on that package."

Q. I want to ask you whether it was possible for him to have seen that there was no address on that package at the time.

(Objected to. Objection overruled.)

Q. Was the package held by you at that time so that Keck could see it?

A. No one could see it. I kept the package in my own pocket. No one saw it but myself.

By the COURT:

Q. You had not shown it to him?
A. No, sir.
Q. You had it how in your hand?
A. That way (illustrating). I did not want him to see the package at all.
Q. You say he could not see whether it had an address on it or not?

102 A. I don't think he could, because my object in holding the package was so that he could not.

By the DISTRICT ATTORNEY:

Q. That was your specific object, so that he could not see it?
A. Yes, sir. He said, "There is no address on that package." I said, "That is a good description of the package. There is no address on it." But I said, "The captain was instructed to deliver it to Van Reeth, 21 West Fourth street, Cincinnati, Ohio." He said, "That is a different firm from the Keck Company." I said, "Are you not a member of the same firm with Van Reeth?" He said, "Yes; I am." I said, "Then this package belongs to your firm." He said, "It does not." I said, "We have the diamonds in Philadelphia and they belong to some one." He said, "I am the only one that has a right to purchase diamonds for either one of those concerns."
Q. What two firms were they?
A. I said the Coeterman-Keck Company and the Van Reeth.
Q. I understood you to say that he admitted that he was a member of the firm of Van Reeth?
A. The same firm as Van Reeth.
Q. You have no doubt about that?
A. No doubt whatever.
Q. You held that box so the palm of your hand would cover at least three sides?
A. Yes, sir; I held it down close to the sides so he could not see it.
Q. Who met Mr. Keck at the dock, if you know?
A. The gentleman who I ascertained to be Mr. Jones, an attorney for Mr. Keck.
Q. A member of the New York bar?
A. I think he was a member of the Cincinnati bar.

By the COURT:

Q. Where did you meet him?

103 A. I met him at the pier. Just as soon as Keck walked down and landed on the pier he was met by a person named Jones, Keck's attorney, from Cincinnati.
Q. At that time you had not seen Keck?

A. I saw him on the "Aller," when we boarded her by Staten island.

Q. How long was that before?

A. We boarded her about eight o'clock.

Q. You say the man met him at what hour?

A. About nine o'clock.

Q. Just as Mr. Keck came on shore?

A. Just as he came on the dock.

By the DISTRICT ATTORNEY:

Q. On the "Aller" you had not charged him with smuggling?

A. No, sir; not in the least.

Q. You had said on the "Aller" that he was not the man you were looking for?

A. Yes, sir; that is right.

Q. Did he state what his business was in Cincinnati?

A. He said his companies were the pioneers of the diamond industries in the West.

Q. Did he make a statement in regard to the amount of diamonds that he had imported into this country?

A. Yes, sir. He said that he had imported into the port of Cincinnati one hundred thousand dollars worth of diamonds from the first of the year. I said to him, "You are mistaken;" that I had a telegram in my pocket in reply to a telegram sent to the appraiser at the port of Cincinnati, and that the total amount of his importations of diamonds at the port of Cincinnati from the first of January to that date did not exceed the value of the assignment
104 which I found in the possession of the captain at Philadelphia, and they were valued at seven thousand dollars. He said, "What are the amounts of my importations?" I said, "You know. I am not going to tell you."

Q. You are positive that he said it was through the port of Cincinnati that he imported the one hundred thousand dollars' worth of diamonds since the first of January?

A. There is no doubt about it. From the first of January to date.

Q. Did he give the business address of the Coeterman-Keck-Henrickson Diamond Company?

A. I think he said one was located at 21 and the other at 19 West Fourth street, Cincinnati, Ohio.

Q. When was it that you first saw, and under what circumstances, that slip of paper addressed to F. Van Reeth, 21 West Fourth street, Cincinnati?

A. I first saw this paper at the hearing before Commissioner Bell on the case against Keck.

Q. You did not get it from the captain?

A. No, sir.

Q. Did you see it gotten from the captain?

A. At that hearing.

Q. Who produced it at the hearing?

A. The captain. At the hearing before Commissioner Bell Cap-

tain Loesewitz produced this paper, and that was the first time I saw it.

Q. Did you make any search of Van Reeth's baggage, who came over with him?

A. No, sir; I made no searches of either the baggage of Van Reeth or Keck.

Q. Were you present?

A. I was present, but some distance away.

105 Cross-examination.

By Mr. SHIELDS:

Q. What is your special duty?

A. To protect the customs revenue.

Q. And to find smugglers?

A. Yes, sir. Reappraisement, classification, establish rates of drawback, and all frauds and crimes committed against the custom service.

Q. Therefore it is part of your duty to find people who smuggle?

A. Yes, sir.

Q. You say you received the information about this smuggling. Did you get that from Mr. Cummings or from Mr. Hess?

A. I received it from Mr. Cummings.

Q. Was Mr. Hess with him when you received it?

A. No, sir.

Q. When was the first knowledge you had that Mr. Hess was in the case?

A. I received the information from Special Agent Cummings by telegraph; not from Mr. Hess. I did not know that Mr. Hess was in the case at the time.

Q. In consequence of that information you boarded this vessel?

A. Yes, sir.

Q. The "Rhineland"?

A. Yes, sir.

Q. You there met the captain at what point of the vessel?

A. In the chart-room.

Q. You told him that he was accused of smuggling?

A. No, sir; I did not. I said, "Captain, we do not charge you with smuggling. I do not think you are a smuggler."

Q. What led him to say that he was no smuggler?

106 A. I don't know. I cannot give you any reasons for that.

Q. You do not know what made him say he was not a smuggler?

A. No, sir.

Q. You had not intimated to him that he was a smuggler?

A. No, sir; not in the least, excepting getting the package.

Q. Then, without any intimation from you, directly or indirectly, that he was a smuggler or was accused of smuggling, he declared he was no smuggler?

A. He said, "I am not engaged in smuggling." I said, "Captain, I do not say you are."

Q. Did you find other smuggled goods on that ship?

A. We did not, but some of the custom inspectors found some small quantity of drugs. That had nothing to do with the captain; that was found in the possession of one of the seamen.

Q. You do not know whether the captain gave it to him or not?

A. No, sir. It was too small a value. It amounted to $20 or $40.

Q. That is all you found?

A. Yes, sir.

Q. Is that the only occasion that you found it on this steamship?

A. That is the only occasion.

Q. The only time?

A. Yes, sir.

Q. When you asked him about this package he said first that he had not any, did he not?

A. I said, "Captain, you have a package for the Coeterman-Keck Diamond Company, of 21 West Fourth street, Cincinnati, Ohio." He says, "No; I have not such a package." I said, "I beg leave to differ with you; you have a small package"—and I indicated the size by my fingers—"which you received while in Antwerp, and I want it." He says, "I have a package for Van Reeth, 21
107 West Fourth street, Cincinnati, and if you have an order for it I will go and get it for you."

Q. At that time he did not give the first name, did he?

A. Yes, sir; he said F. Van Reeth, 21 West Fourth street, Cincinnati.

Q. You are quite sure he gave the initial at that time?

A. Yes, sir.

Q. At that moment?

A. Yes, sir.

Q. The same initial that you subsequently found on this paper when it was produced at a hearing? How many weeks afterwards?

A. About four or five weeks.

Q. So that up to that time you had not seen this paper?

(Paper shown witness.)

A. Never saw the paper until it was produced at the hearing.

Q. At the captain's hearing?

A. Yes, sir.

Q. At the hearing at which he was bound over?

A. No; not the captain's hearing, but Keck's hearing.

Q. Had the captain had his hearing before?

A. Yes, sir; the captain had his hearing and was indicted.

Q. He had been indicted at that time, had he?

A. Yes, sir.

Q. He did not produce this paper at his own hearing?

A. No, sir; I think he waived a hearing.

Q. Did you ask this man how Keck was dressed when he was giving you this general description that you have spoken of?

A. I do not recollect whether I asked him how he was dressed or not. I possibly may have, but I do not recollect.

Q. You do not recollect asking what kind of hat he wore or what kind of clothes?

08 A. Probably I did, but I cannot say positively now.

Q. You were a special agent?

A. Yes, sir.

Q. Specially charged to perform this detective work, were you ot?

A. Not specially for that work.

Q. You were engaged in that kind of work?

A. Once in a while.

Q. At this particular instant you were engaged in it, were you ot?

A. Yes, sir.

Q. Therefore it was important for you in the performance of that etective work to get all these details?

A. Yes, sir.

Q. Why can you not recollect?

A. I might have asked him. My recollection will not bear me ut that I did ask him, and I won't say anything. I do not recol-ect.

Q. How can you remember the other so well?

A. Because I was very particular to get Keck's description.

Q. Being particular, was it not very important in the perform-nce of such detective work to get the description of the clothing?

A. Yes, sir.

Q. As you always do so?

A. Yes, sir.

Q. Can you account for the fact why you did not do so this time?

A. I cannot say but what I did, but my recollection cannot bear ne out. I may possibly have asked the captain for the clothes.

Q. You do not remember that part of it?

A. No, sir.

Q. But you do remember the other?

A. Yes, sir.

Q. Will you explain to the jury why, as an officer perform-

09 ing that particular duty, you remember distinctly as to part of what happened but have no recollection as to the other?

A. I may have overlooked that.

Q. That is the only explanation you have to make, is it?

A. Clothes is not a good criterion to go by. In a great many of ny cases I pay no attention to clothes whatever. All I want is the hysical features of the man—size and complexion. I pay no at-ntion to the clothes.

Q. I understood you to say you usually do ask about the cloth-ng.

A. I do not.

Q. Did you say that a moment ago that you did?

A. I may have said that, but I did not.

Q. If you do not do it, why did you say you did do it?

A. When you ask a person for a description, the features, the size, nd complexion was the most material part.

Q. You say now that you did not ask about the clothes?

A. I do not say that I did not. I say we may ask. I do not consider it an important feature.

Q. You went to New York with whom?

A. Myself.

Q. Whom did you meet there?

A. I met Special Agent Cummings.

Q. And?

A. And Mr. Hess.

Q. And Mr. Frankel?

A. No, sir; I did not meet Mr. Frankel—at least, I did not know any one by that name. I met a gentleman.

Q. Do you know the secretary of the Diamond Cutters' Association?

A. Not by name.

110 Q. Did you meet him?

A. I could not say that I did.

Q. Was Mr. Hess counsel for that company?

A. My information leads me to believe that he is.

Q. Mr. Hess was there also with Mr. Cummings, the special agent, in New York to meet you when you landed. That is true, is it not?

A. No. When I arrived at the St. Dennis hotel I received a letter from Mr. Hess saying he would like for me to call on him when I arrived. I called on him. He was busy at the time; at least it was more convenient for me to go to meet him.

Q. Did he come down to the "Aller" with you and Mr. Cummings?

A. No, sir; he did not come on board the "Aller" at all. I did not see Hess then until late that evening, when we arrived on the "Aller" at the pier.

Q. You found him on the wharf on the arrival of the "Aller"?

A. Yes, sir.

Q. With whom? Was it not Mr. Frankel, the secretary of the Diamond Cutters' and Importers' Association?

A. I do not know Mr. Frankel by name.

Q. Was it not a gentlemen who was identified as such to you?

A. There was a gentleman introduced to me as representing Frankell & Company; I thought he was the gentleman.

Q. As matter of fact, you have said this information came from Mr. Cummings and Mr. Hess?

A. No, sir; it came from Special Agent Cummings.

Q. Do you not know that the persons behind this transaction of Keck's were the diamond merchants in New York?

A. I do not know anything about it and I do not care. We are only interested for the Government.

Q. Is not that true?

111 A. No; I do not know that it is true.

Q. Do you know what Mr. Hess was doing there with you and Cummings on the wharf?

A. I took it for granted he was assisting us, the customs officers.

Q. When you first spoke to Mr. Keck there was no denial on his art that that was his name?
A. None whatever.
Q. None as to where he lived?
A. No, sir.
Q. And none as to the business he was engaged in?
A. No, sir.
Q. When you first suggested that he should come over to Philadelphia he said frankly and at once he would, did he not?
A. Yes, sir.
Q. After that will you tell the court and jury what was the treatment that he complained of?
A. I did not see anything outside of the usual treatment afforded passengers.
Q. Did you not see these officers seize his private papers, which ney were subsequently obliged by the Government at Washington return?
A. No, sir; I did not see them.
Q. Did you not see them take them?
A. No, sir; I did not.
Q. Do you not know they did?
A. I heard afterwards, but I do not know of my own knowledge.
Q. Is not that the very treatment that he complained of?
A. No; not to me.
Q. How many officers were there surrounding this one man?

The COURT: This man may state what search he saw made, and that is as far as he can go, and what was found.

By Mr. SHIELDS:

Q. What search did you see made?
A. Very little. They commenced to examine Mr. Keck's baggage the pier, and I was about as far as that railing from him, and ter working for about five minutes at it they took him in the ivate room, and I did not go in that room or near the room or look the window to see what was being done.
Q. Who was in the room with him?
A. Two or three officers.
Q. You saw nothing of the search at all?
A. Nothing except what I just told you.
Q. Mr. Keck did come over to the city of Philadelphia without ing brought here, did he not, by papers or anything else?
A. Yes, sir. We did not want to arrest him in New York.
Q. He did come over without any arrest and without any papers?
A. Yes, sir.
Q. In the course of your conversation with him, I understood you say that it was possible; that perhaps the captain wanted to put on him.
A. Yes, sir.
Q. What was it you said exactly as to that?
A. I cannot say the exact words. He said to me—I thought this

way. He showed a disposition to go over right away, and I thought very possibly there might be a mistake on the part of the captain. He was very willing to meet the captain, and I thought if he was guilty of it he would not be so willing to do so; but as soon as he turned around and recovered himself he said he would not go and would insist on his rights; that he had not been treated fairly there.

113 Q. What excuse did he give for not coming over?

A. He said, "I don't think I will go. I have not been treated right tonight. I will insist upon the necessary papers."

Q. It was after he had been searched that he made that remark?

A. Yes, sir; after he had promised to go over.

Q. And after he had been searched?

A. Yes, sir. I told him I was not responsible for that searching.

Q. Did you show him the package on board the "Aller"?

A. I held it in my hand so that if he looked very close he might have been able to see it.

Q. You do not recollect exactly how you held it on board the ship, do you?

A. Yes, sir; I do; the same way.

Q. You have just now said that you did not know.

A. I made my mind up in showing that package I would hold my hand over it, so it would be difficult for him to see what was on it, whether there was any address there.

Q. But you held it in your hand, did you not?

A. Yes, sir.

Q. You turned it down?

A. With a determination to so hold it he would not be able to see the address.

Q. You turned it down?

A. No, sir.

Q. Did you not show it to him?

A. No, sir.

Q. Are you positive of that?

A. I am positive.

Q. At any stage?

A. At any stage, except through the hearing.

Q. I am speaking either on board the vessel or on the wharf.

114 A. That is right. I did not show it.

Q. Where was it that he told you that it had no mark on it; was it on board the vessel or on the wharf?

A. In the room, after he had refused to come over.

Q. Had you not talked with him and held it in your hand before he went into the room?

A. No, sir; I held it in my coat. I had my left hand in my coat.

Q. Did not bring it out at all?

A. I had it in my hand, in my overcoat.

Q. Did you not have it out?

A. Yes, sir; I had it out.

Q. You had it out on the wharf, did you not?

A. No, sir; I did not have it on the wharf. I had it out in the room when I asked him the question.

Q. Did you not show it to him on the wharf and put it right to him?

A. No, sir.

Q. And say to him, "Wait, Mr. Keck, until we confiscate all your factory and ruin your business"?

A. No, sir; never used such word.

Q. What was it you said about confiscation?

A. I never said a word about confiscation.

Q. Did you make a threat of any kind?

A. No, sir.

Q. No indication of a threat?

A. No; no indication whatever.

Q. You were asked the question as to who met him. Mr. Jones, as you learned, had been in New York for some weeks, attending to Mr. Keck's business, did you not?

A. I did not know anything about that.

Q. Did you not hear him say so?

115 A. No; I do not recollect of hearing him say so.

Q. You did not hear it stated by Mr. Jones right then and there?

A. I do not recollect him saying so; he may have said so.

Q. Was it you that charged Mr. Keck with passing a package to Mr. Jones?

A. No, sir; never.

Q. Who was it?

A. I do not know; I do not know of any such assertion.

Q. Did not Mr. Jones demand then and there that he should be searched?

A. No, sir; not in my presence. I do not know anything about it; I do not know whether Mr. Jones was searched.

Redirect examination.

By the DISTRICT ATTORNEY:

Q. You were asked as to the captain's statement, "That I am no smuggler." Was that said before or after you had told him that you were a Treasury agent, and that he was suspected of having brought these diamonds in improperly?

A. After I had shown him my card and told him who I was.

Q. Then it was that he said he was not a smuggler?

A. Yes, sir.

Q. State the day that Mr. Keck came over to Philadelphia, whether you pointed out Keck to Captain Loesewitz before the captain identified him.

A. No, sir; on the contrary, I had the captain in the private office of the district attorney, and Keck and two other gentlemen were about seven or eight feet, or about that distance, north of the entrance to the United States district attorney's office, and there were quite a number of people in the corridor that day, making

application to be naturalized. I said to the captain, "Now,
116 I want you to go out and turn to your right and go all the way down the corridor and look around and see if you can identify this man that you got the diamonds from, and then turn and go down and see if you can find him." He did so. I watched him; he went all the way down; he could not find any one down at the lower end of the corridor; he walked northward and saw three gentlemen standing together, and he came back to me and said, "One of those three gentlemen; the one that has the cabba in his hand."

Q. Who was that?

A. That was Keck. I said, "Captain, are you positive of that?" He said, "Certainly, I am positive of it. That is the man; no doubt about it."

Recross-examination.

By Mr. SHIELDS:

Q. You were examined before the commissioner at the hearing of Mr. Keck, were you not?

A. Yes, sir.

Q. I understood you to say that you are quite sure that you had never spoken to Mr. Frankel, the secretary of this association?

A. Yes, sir.

Q. Do you remember what you swore to before the commissioner?

A. Yes, sir. I thought that the gentleman that I spoke to was Mr. Frankel. I ascertained afterwards it was not. It was a representative of Mr. Frankel's.

Q. You did swear before the commissioner that you had spoken to him?

A. Yes, sir. I thought it was Frankel, but I ascertained afterwards it was a representative of Mr. Frankel.

Q. The same Mr. Frankel who is secretary of this Diamond Cutters' Association?

A. I do not know. I could not say.

117 By the COURT:

Q. That is, the man whom you said was Frankel you discovered afterwards was his representative?

A. Yes, sir.

Q. You were misled?

A. Yes, sir.

JAMES C. CUMMINGS, having been duly sworn, was examined as follows:

By the DISTRICT ATTORNEY:

Q. What is your official position?

A. Special agent of the Treasury Department.

Q. Located where?

A. New York city.

Q. You were present on the "Rhineland" at the time these diamonds were seized?

A. I was.

Q. Were you there for the purpose of seizing these diamonds when they came in?

A. I was here operating in connection with Mr. Gallen, who seized the diamonds.

Q. You had some information these diamonds were coming?

A. Yes, sir.

Q. Tell us in your own way what occurred.

A. I think it was about the time that the captain said to Mr. Gallen that he had a package for Van Reeth that I came into the captain's chart-room.

Q. You were not in when Gallen started the conversation?

A. No, sir; I came in as the captain said he had a pack-
118 age for Van Reeth, Cincinnati.

Q. Did you hear whether he was asked that question before he answered it?

A. That I do not know.

Q. You just heard him say that as you entered?

A. Yes, sir; he then asked Mr. Gallen if he had an order for the package and Mr. Gallen said that he had, and the captain said, "Give me the order and I will give you the package." Then Gallen said, "Give me the package and I will show you the order." After the captain had finished writing off his log book the captain said he would go down and get it. He started down and Mr. Gallen followed him down to the room, and I went down also, and the captain produced the package down in his room.

Q. Where did he have it?

A. In his room.

Q. He produced it?

A. Yes, sir.

Q. Was the door locked when you came there?

A. It was not.

Q. Was it open?

A. Yes, sir; they were standing right in the doorway.

Q. Is this the package that he produced? (Package shown witness.)

A. Yes, sir.

Q. Was it opened in your presence?

A. Yes, sir.

Q. What did it contain?

A. It contained the cut diamonds.

Q. Do you know how many?

A. No, sir.

Q. There were quite a number, were there not?

A. Yes, sir.

119 Q. Were these seals upon it?

A. Yes, sir.

Q. Was there any address upon the package?

A. There was not.

Q. What, if anything, did the captain say as to his knowledge of the contents of that box?

A. The captain said that he did not know what was in the box.

Q. Did he say that before it was opened?

A. Yes, sir.

Q. Did he say from whom he got it?

A. No, sir; not in my presence.

Q. What else, if anything, do you recall that was said that day?

A. That is about all that occurred in my presence.

Q. Did you hear a description given the next day to Mr. Gallen?

A. No, sir; I left that night for New York.

Q. You went over to New York and you were on board the "Aller" when it landed, were you not?

A. I was.

Q. Were you present when the conversation took place between Gallen and Keck?

A. On the "Aller" or on the pier?

Q. You were not present at the first conversation when Keck came out of the urinal, were you?

A. No, sir.

Q. When was it that you first saw Keck?

A. I saw him in the cabin of the vessel.

Q. Who were present?

A. A number of passengers and the regular official officers.

Q. What, if any, conversation did you have with him or any one else in your hearing?

120 A. None on the boat.

Q. Tell us what next took place.

A. When the vessel docked, Mr. Keck and a young man came along with him—Mr. Van Reeth—and they were watched by different officers.

Q. They were traveling together, were they?

A. They were traveling together.

Q. Do you know what the full name of this Van Reeth was?

A. He was on the passenger list as # C. Van Reeth.

Q. They were taken together to what place?

A. They were not taken together; they were kept separate on the dock.

Q. Where was Keck taken?

A. Keck was taken in one of the offices. I think the office used for the customs.

Q. By whom?

A. By the regular officers.

Q. And other officers went with Van Reeth?

A. Yes, sir.

Q. Were you present when Gallen had conversation with Keck after they left the "Aller"?

A. No, sir; I was there very little.

Q. Did you hear any portion of it?

A. No, sir; not much.

Q. You devoted most of your time to Van Reeth?

A. Yes, sir.

Q. Was there anything found in Van Reeth's trunk connected with the diamond business?

A. There was quite a large quantity of diamond paper, used in wrapping diamonds—quite a large quantity.

Q. Were there any implements used in the cutting of diamonds?

121 A. Yes, sir.

Q. Do you know whether or not a cablegram was sent to him that you saw?

(Objected to. Objection sustained.)

Q. You were not present when Mr. Gallen had the box and Mr. Keck made the remark there was no address on it, were you?

A. No; I did not hear it.

Cross-examination.

By Mr. SHIELDS:

Q. You are engaged in the same business as Mr. Gallen, only you are in New York and he is here?

A. Practically the same.

Q. You are the Mr. Cummings that gave Mr. Gallen his information?

A. Yes, sir.

Q. You got it from Mr. Hess?

A. I did not.

Q. Who did you get it from?

A. I decline to answer.

Q. Will you say whether you got it from the secretary of the Diamond Cutters' Association?

A. I decline to answer anything connected with where I got my information. I decline to answer where I got my information.

The COURT: You may ask him whether he got it from a particular source.

By Mr. SHIELDS:

Q. You got the information from Mr. Frankel, did you not, the secretary of the Diamond Cutters' & Importers' Protective Association, or something of that kind?

A. I will not answer, only under the order of the court.

The COURT: The court will require you to answer.

A. I did.

122 By Mr. SHIELDS:

Q. When he was arrested you searched his baggage, did you not?

A. I did not.

Q. Were you present when it was done?

A. I was not.

Q. Did you not get his private correspondence from his baggage?
A. I did not.
Q. Did you not have it in your possession?
A. I did; it was turned over to me.
Q. It was taken and turned over to you?
A. Yes, sir.
Q. And you subsequently were required by the Government to return those private papers to him, were you not?
A. No, sir; I returned them of my own volition.
Q. You did return them?
A. Yes, sir.

By the DISTRICT ATTORNEY:

Q. Those papers were turned over to you by the advice of Mr. Keck's attorney, were they not? Mr. Keck's attorney advised Mr. Keck to turn over the papers.
A. I don't know as to that; they were put into a little satchel.
Q. Was there any objection at all?
A. No, sir.

By Mr. SHIELDS:

Q. You were not there when they were taken, were you?
A. No; I was not there when his baggage was examined.
Q. How do you know there was no objection?
A. There was no objection when the package was turned over to me.

By the DISTRICT ATTORNEY:

Q. The information you get from the department in cases
123 of violation of the law you are instructed to regard as confidential, unless the court instructs you to answer?
A. Yes, sir.
Q. A great deal of reference has been made to this retail dealers Diamond Cutters' Protective Association; that is an association to prevent the violation of the revenue laws in matters of the importation of jewelry?
A. It is; it is composed of the most reputable diamond brokers in New York city.
Q. It is composed of the entire dealers of the United States?
A. Yes, sir.

(At one o'clock the court took a recess until two o'clock.)

2 P. M.

TIMOTHY J. DONAHUE sworn.

By Mr. BECK:

Q. What is your present position?
A. Inspector of customs.
Q. Stationed at what port?
A. New York.

Q. Were you present on board the "Aller" when it came in with Herman Keck as a passenger?

A. I was.

Q. You saw Mr. Keck, did you, on that occasion?

A. I did.

Q. Had you ever seen him before?

A. Not before that time.

Q. What, if anything, did you do? Tell us in your own way.

124 A. After he made his declaration on board the ship I was ordered by the deputy surveyor to keep watch on him to see with whom he connected on board the ship. Myself and another inspector by the name of John Murphy were told by the deputy to watch him and see whom he connected with, and until after the baggage was examined on the pier. We did so, and after his baggage had been examined the deputy surveyor gave this order to take him on board the ship and search his person, and we took him on board and took him to a state-room and searched his person?

Q. Who were present?

A. Inspector Murray, myself, and Mr. Keck.

Q. What, if any, conversation did you have with Mr. Keck, and what did he say as to who he was and where he came from?

A. He told me it was ridiculous to detain him, to suspect that he was smuggling in diamonds; that he was doing a business of nearly $300,000 a year, and was importing his diamonds regularly.

Q. What, if anything, did he say as to how much he had imported since the first of the year?

A. He did not say the first of the year, but he said he imported nearly $300,000 a year.

Q. What, if anything, did he say as to who he was?

A. He said that he was connected with a firm in Cincinnati.

Q. Did he mention what firm it was?

A. That he did all the buying for the firm.

Q. Did he say buying of what?

A. Buying diamonds.

Q. Did he say what firm it was?

A. Yes, sir.

Q. What one was it?

A. I think he said Keck & Co.

125 Q. Did he mention any other firm?

A. No; not at that time.

Q. Did he at any other time?

A. Yes, sir; later on he did.

Q. What was it?

A. I am a little ahead of my story. I asked him who the young man was that was in his company, that was on the pier, which Special Agent Cummings and Inspector Brown were watching. He said he was a young man, the son of the manager of their firm in Cincinnati. I also asked him if he had any diamonds, and he said he did not.

Q. Did he mention the young man's name?

A. Not at that time he did not.
Q. Did he afterward?
A. Yes, sir.
Q. What was the name?
A. I think he said Van Reeth.
Q. And he said Van Reeth had no diamonds?
A. He said he did not have any.
Q. He said Van Reeth was a son of the manager?
A. Of the manager.
Q. What was the exact expression?
A. He said the manager of their firm.
Q. Did he mention the name of the firm that he was manager of?
A. He did not say. This is the way he said the words: "He was manager of our firm."
Q. Were you present when Mr. Gallen had the conversation with Mr. Keck in regard to the box?
A. Part of the time I was.

Q. What, if anything, did you hear Mr. Gallen say to Keck
126 or Keck to Gallon?

A. I heard Mr. Gallen tell him that he had better come to Philadelphia. I think he said that there was a train about 11 or 11.30—some time—and confront the captain, and if the captain had made a mistake, if he was not the man, it was all right; but the captain had made a declaration that he answered the description of the man who, the captain said, gave him the diamonds in Antwerp. Mr. Keck said he would go, but later on he refused to go.
Q. What reason did he give?
A. They had several arguments there, talking about going. At one time Mr. Keck said he would go. Another time he said he would not go and Mr. Gallen said, "Now, there is no harm in your going. If you are not the man and the captain don't identify you, there is no harm in your going." He said he could not, for he did not know the captain.
Q. Did you see Gallen have this box?
A. I did.
Q. The way he held it, could you see whether there was any address upon it?
A. I could not.
Q. Did you see him when he asked Mr. Keck about for whom this package was intended?
A. No; I was not listening to him at that time.
Q. Were you present when a conversation was had between Keck and Gallen, when Keck said there was no address upon that package?
A. I would not like to swear that I was present then.
Q. You were in and out, were you?
A. I am a little hard of hearing, and there were a number of officers in the custom-house office on the pier at the time of the conversation between Mr. Gallen and Mr. Keck.

127 Q. Did you hear Keck say to Gallen whether or not he was in Antwerp on January 27th?

A. I have heard Mr. Gallen charging him with being there and being in the Hotel Victoria. I think he said the Victoria. He said he was not there.

Q. Was not where; at the Victoria?

A. In Antwerp.

Q. He was not in Antwerp?

A. Yes, sir.

By the COURT:

Q. Did he say he was not there?

A. He said he was not in that hotel and Gallen said he was in another café. I forget the name, but Keck said he might have been.

By Mr. BECK:

Q. Did Gallen mention the date?

A. About the 27th of January.

Q. As I understand it, to clear it up, Gallen charged him with being in Antwerp, at the Hotel Victoria, on January 27th?

A. Yes, sir.

Q. And thereupon Keck denied that he was at the Hotel Victoria?

A. Yes, sir.

Q. And then Gallen charged him with being at a café whose name you have forgotten?

A. Yes, sir.

Q. Would you remember the name of the café if I mentioned it?

A. I think I would.

Q. Was it the Café Alsacienne?

A. I think that was the one.

Q. When he charged Keck with being present on January 27th, at the Café Alsacienne, what, if anything, did Keck say?

128 A. He said he might have been there.

Q. That is all the reply he gave?

A. That was about all I heard.

Cross-examined.

By Mr. SHIELDS:

Q. Your hearing is a little defective, is it not?

A. At times; but, if I want to listen to you, I can do so pretty well.

Q. On that day it was, as you have frankly stated, a little defective?

A. Well, a little bit.

Q. Do you recall whether he said he imported $300,000 or that the firm was worth $300,000?

A. He said he was doing business and importing diamonds; doing a business of about $300,000 a year.

Q. Then, the two together, he was doing business and importing $300,000?

A. He said he was doing a business of $300,000 a year.
Q. And was also importing?
A. Importing; yes, sir.
Q. Did he not say that the firm was worth $300,000?
A. I did not ask him what the firm was worth.
Q. Are you sure you have got it right?
A. I have got it right.
Q. You are quite positive about that?
A. Yes, sir.
Q. You were not on the "Aller" with him when Mr. Gallen had the box, were you?
A. I was.
Q. Mr. Gallen says there was nobody there at that time.
A. We boarded the ship as quick as Mr. Gallen did.
Q. Were you with Mr. Gallen?
129 A. No, sir.
Q. I mean you were not with Mr. Gallen?
A. I went on board the "Aller" with Mr. Gallen.
Q. Were you with Mr. Gallen when he showed the box or had the box in his hand on board the ship?
A. I was not, but I saw him show him in the office.
Q. Where you saw him was on the wharf, was it not?
A. I did not see him on board the ship showing it to him.
Q. You did not see him on board the ship; it was on the wharf?
A. On the wharf.
Q. The district attorney asked you what reason Mr. Keck gave for not going over. Was it not because he said he had been treated badly, and that his papers had been taken from him?
A. I do not know what his reasons were.
Q. Did not Mr. Keck state those reasons?
A. Not in my presence.
Q. Were you there when Mr. Gallen was there?
A. I was.
Q. You heard what Mr. Gallen said about it?
A. Not all the time. The deputy surveyor and Mr. Gallen and two or three other inspectors were there most of the time. The deputy surveyor had taken the papers.
Q. When the district attorney asked you if you searched his person did you state you searched him?
A. I did.
Q. Did you find anything about him or about his baggage?
A. No, sir.
Q. Nothing was concealed in his baggage or about his person?
A. No.
Q. You examined it thoroughly and carefully?
130 A. I examined his person thoroughly.
Q. You examined his baggage thoroughly?
A. I did not.
Q. Who did that?
A. Another officer.
Q. You were present?

A. Part of the time; yes, sir.
Q. Even the soap he had was broken, was it not?
A. I did not see the soap broken.
Q. Was it not broken up?
A. There were three or four rough diamonds found in his baggage; two or three or four, I will not be sure which, whether it was four or three.
Q. What were they?
A. They were found in his satchel, and a scale for weighing diamonds, a package of diamond polish, and that is about all.
Q. They were all on the free list, were they not?
A. They were all amongst his papers.
Q. They were on the free list, were they not?
A. No, sir.
Q. They were not dutiable?
A. They were not on the free list, but I do not believe there was enough for duties.
Q. You do not mean to say they were rough diamonds, do you? It is what is called diamond bort, is it not?
A. Something like that.
Q. Just answer the question. What you found there you call rough diamonds?
A. I think they were rough diamonds before they are cut and polished.
Q. Are they not called diamond bort?
31 A. I do not know.
Q. On the free list under that name?
A. They are subject to the same duty.
Q. You did not seize them, did you?
A. I did.
Q. What did you do with them?
A. The officer who examined his baggage was called the appraiser. The appraiser said there was not enough there for duty.
Q. Did he say that they were diamond bort?
A. I do not know what the appraiser rated them as.

Redirect examination.

By Mr. BECK:

Q. Were those diamonds on his declaration as a passenger?
A. No, sir.

JOHN P. MURRAY sworn.

By Mr. BECK:

Q. What is your official position?
A. A special employee of the United States Government.
Q. In what capacity?
A. Looking to stop smuggling.
Q. You are a custom-house inspector?
A. A custom-house inspector.

Q. Did you board the "Aller" on the occasion when Herman Keck was a passenger?

A. No, sir; I met her at the dock.

Q. You were there for the purpose of inspecting baggage?

A. No; I was there for the purpose of seeing the baggage was properly inspected.

132 Q. Did you see Keck on that occasion?

A. Yes, sir.

Q. Had you ever seen him before?

A. No, sir.

Q. You have no difficulty in recognizing him now?

A. No, sir.

Q. You were present with Mr. Donahue when his baggage was searched?

A. Yes, sir.

Q. Tell us in your own way what, if any, conversation you had with Mr. Keck as to any matter.

A. The only conversation we had with Mr. Keck was just as Mr. Donahue said. We took charge of him from the time he struck the dock, saw that the inspector properly examined his baggage, and after his baggage was examined we took him on board the ship to the state-room he occupied on the voyage and searched him. While searching, we asked him who Mr. Van Reeth was—the young man who was with him. He said he was a son of the manager of one of their concerns in Cincinnati.

Q. Did Keck mention what his business was?

A. Yes, sir; he said he was a diamond dealer and purchaser for a house in Cincinnati.

Q. Did he say where the address of that business house in Cincinnati was, in your hearing?

A. He did.

Q. What was it?

A. I do not recollect the name of the street.

Q. Would you recollect it if I stated it to you?

A. Yes, sir.

Q. Was it 21 West Fourth street, Cincinnati?

A. I believe it was.

133 Q. Did he name the firm that he was connected with?

A. Not at that time; he did not.

Q. Did he at any subsequent time?

A. When he was being examined in the custom-house office by Mr. Gallen he said that he was a member of two or three concerns in Cincinnati—that is, that he was associated with two or three different concerns in Cincinnati.

Q. Did he give their name?

A. Keck and Co. and some other name he gave; yes, sir.

Q. Did he name Coeterman-Henrickson-Keck Company?

A. Yes, sir.

Q. Did he say which of these firms this young Van Reeth, his traveling companion, was a son of the superintendent of?

A. Of the cutting and polishing concern.

Q. Did he mention the name?
A. I do not know whether he did or not. He said he was manger of the cutting and polishing concern in Cincinnati.
Q. Cutting and polishing of what?
A. Diamonds.
Q. Did you hear the conversation between Gallen and Keck as to whether or not he was in Antwerp on January 27th?
A. Yes, sir.
Q. What took place?
A. He said that he was in Antwerp on the 27th, and asked him if he was at a certain hotel—I believe it was the Victoria. He said no. He then asked him if he was not in some café; I believe the Alsacienne. I do not believe he answered that. He said he might have been.
Q. Were you present when Gallen had the box in his hand and Keck said there was no address upon it?
A. Yes, sir.
Q. Tell us what took place as you remember it?
A. Mr. Gallen said to him, "I have got a package that the captain of the 'Rhineland' said belongs to your concern." He said, "It does not; there is no address on it."
Q. Where was that package at the time Keck said that?
A. In Mr. Gallen's hands.
Q. How was Mr. Gallen holding it?
A. He was holding it something like that (indicating).
Q. Was he holding it so you could see the address that was upon the box?
A. No, sir.
Q. How near Keck were you?
A. I was as near to him as I am to you.
Q. In your judgment, could Mr. Keck have possibly seen whether that address was upon the box?
A. I do not think so.
Q. Had Mr. Gallen that box in his hand before that that you saw?
A. I never saw it before that.
Q. Did you see him draw it from his pocket?
A. Yes, sir.
Q. Just describe what he did?
A. He took it out and said, "Here, I have got a box for your concern from the captain of the steamship 'Rhineland,' landed in Philadelphia."
Q. Then Keck said, "There is no address upon that box"?
A. He said there was no address on the box; he also said it was addressed to Van Reeth & Co., Cincinnati.
Q. Who said that?
A. Mr. Gallen. He said, "You are a member of that concern?" He said, "Yes; I am the only man that has got any authority." He said, "I am the purchaser for that concern of all diamonds—purchase all diamonds for that concern."

Q. He said he was the only one who purchased diamonds for Van Reeth & Co. and that he was a member of that firm?

A. Yes, sir.

Q. Do you recall any other feature of the conversation?

A. About him going to Philadelphia.

Q. Can you tell us whether, before he refused to go to Philadelphia to meet Captain Loesewitz, he had been in consultation with Mr. Jones, his attorney?

A. Yes, sir; and Mr. Jones was authorized to keep away from him.

By the COURT:

Q. What is it you say?

A. I say the deputy surveyor told Mr. Jones this man was under suspicion, and the best thing he could do was to let him alone until the custom-house officers got through with him. Afterward he was left with Mr. Jones and Mr. Jones allowed to speak for him.

By Mr. BECK:

Q. It was after the interview he declined to go to Philadelphia?

A. Yes, sir.

Cross-examined.

By Mr. SHIELDS:

Q. Do you mean to swear it was after the interview with Mr. Jones he declined to go to Philadelphia; is that true?

A. Is what true?

Q. That it was after the interview with Mr. Jones that Mr. Keck declined to go to Philadelphia, as you have just sworn?

A. He declined first to go; then afterward, when we went out on the dock, he had an interview with Mr. Jones again.

136 Q. Had he declined before the interview with Mr. Jones to go to Philadelphia?

A. He agreed to go first.

Q. Will you please answer my question?

A. I am trying to, if you let me. He agreed to go first. Then he said, "I object. I have got some rights here. I object to go." We brought him on the dock. Mr. Gallen said he would put him under arrest if he did not go. Then he had an interview with Mr. Jones. Whatever they agreed to do they agreed to come the following day.

Q. You just now said after the interview with Mr. Jones he declined to go. Now you say after the interview with Mr. Jones he agreed to go.

A. I say he agreed and refused to go, both before and after.

THOMAS BARRY sworn.

By Mr. BECK:

Q. Where do you live?

A. I live in Cincinnati, Ohio.
Q. What is your position?
A. Letter-carrier.
Q. Do you serve letters on the route where this man's business place is located?
A. Yes, sir.
Q. I want you to describe what No. 21 West Fourth street, Cincinnati, is. How long have you served letters at that place?
A. Since August, 1890.
Q. What signs are upon that business place?
A. "Keck Manufacturing Co.;" "Keck Diamond Company." That is all the signs that I ever noticed.
137 Q. What mail do you deliver at that place which is received?
A. I deliver the Keck Manufacturing Company's, the Coeterman-Henrickson-Keck Diamond Company's, and anything addressed to Herman Keck or Mr. Austin.
Q. You also deliver mail to the Coeterman-Henrickson-Keck Diamond Company at that place?
A. Yes, sir.
Q. Have you noticed what is the character of the mail that is delivered to the Coeterman-Henrickson-Keck Diamond Company, with reference to the place from which letters come?
A. Foreign.
Q. You have noticed that they are all foreign letters that go there?
A. Yes, sir.
Q. What about domestic mail from the United States?
A. Domestic mail is mostly to the Keck Manufacturing Company.
Q. Have these concerns different rooms for their business purposes?
A. I deliver the mail all in one place.
Q. All in one room?
A. Yes, sir.
Q. Will you please state whether or not you have delivered mail to all these concerns, and to Herman Keck individually?
A. I have.
Q. Frequently or infrequently?
A. Frequently.
Q. Has any mail addressed to the Coeterman-Henrickson-Keck Diamond Company been returned to you as not properly delivered?
A. No, sir.
Q. Do you know F. Van Reeth?
A. I do not.
Q. Is there a sign "Van Reeth & Co." at 21 West Fourth street, Cincinnati?
138 A. No, sir.
Q. Is No. 19 as well as No. 21 West Fourth street on your route?
A. Yes, sir.

Q. Is there any sign of "F. Van Reeth" or "F. Van Reeth & Co." upon either of those buildings?

A. None that I ever noticed.

Q. Have you since 1890 ever delivered any letters that you remember to either F. Van Reeth or F. Van Reeth & Co. at 19 and 21 West Fourth street, Cincinnati?

A. Not to him, individually, I have not.

Q. I mean letters addressed to F. Van Reeth and F. Van Reeth & Co.?

A. I have.

Q. What is the character of 19 West Fourth street, Cincinnati?

A. It is all right as far as I know.

Q. What I want to know is is No. 19 and 21 one business establishment, or is No. 19 one business establishment and 21 another?

A. 19 has always been used by Mr. Holland, a neighbor of Mr. Keck's, next door, a business concern.

Q. Is it a business house or a private house?

A. A business house.

Q. What is the character of business at No. 19?

A. A diamond-cutting establishment.

Q. And No. 21 is a diamond-cutting establishment, but they are separate houses?

A. No, sir; they are not.

Q. That is what I asked you. Are they one single building?

A. One single building.

Q. Do I understand you to say you have or have not delivered mail addressed to F. Van Reeth or F. Van Reeth & Co. at that place?

A. I have delivered it.

139 Q. But not to Mr. F. Van Reeth personally?

A. No, sir.

Q. Is that frequent or infrequent, letters to F. Van Reeth?

A. They are not very frequent.

Q. Are the letters addressed to 21 or 19?

A. At 19.

No cross-examination.

GEORGE W. CRITES sworn.

By Mr. BECK:

Q. What is your position?

A. Special agent of the Treasury Department.

Q. Located where?

A. Cincinnati, Ohio.

Q. Cincinnati is a port, although not upon the sea?

A. Yes, sir.

Q. Have you made an examination of the invoices filed in that port to see what quantity of diamonds have been imported through the port of Cincinnati since the first of the year by Herman Keck or Herman Keck & Co. or the Coeterman-Henrickson-Keck Diamond Company?

(Objected to. Objection sustained.)

Q. Do you know who F. Van Reeth is?
A. No, sir; I do not know him personally.

The district attorney offers in evidence the certificate of the secretary of state of Ohio, showing the incorporation of the Coeterman-Henrickson-Keck Diamond Company.

(Objected to.)

It is admitted that Herman Keck and F. Van Reeth are
140 connected with the company in question.

No cross-examination.

CHARLES B. HOLBROOK sworn.

By Mr. BECK:

Q. What is your position?
A. Permit clerk of the Philadelphia custom-house.
Q. Have you made an examination to see whether or not in the shipment of 563 diamonds by the steamship "Rhineland" any consular invoices were sent from either Liverpool or Antwerp?
A. I have not; but in my position as permit clerk the invoices would have to pass through my hands.
Q. As a matter of fact, have any invoices passed through your hands for this shipment of 563 diamonds?
A. They have not.
Q. Has any entry ever been made for those diamonds?
A. There has not.
Q. If there had been you would have known it?
A. I would have written the permit for their delivery.
Q. Just look at one package of those diamonds and say whether they are dutiable or not.

(Diamonds shown witness.)

A. I would state that the appraiser should be the judge of this.

By the COURT:

Q. Can you say?
A. I can. They are dutiable.

By Mr. BECK:

Q. What kind of diamonds are they?
A. Cut diamonds.
141 Q. What are they dutiable at?
A. 25 per cent.

Cross-examined.

By Mr. SHIELDS:

Q. It is a bad lot of stuff, is it not—cheap stuff? It is called yellow, is it not?
A. They are not first class.

Q. They are very poor, are they not?
A. What we call yellow.
Q. Very poor yellow at that, are they not?
A. Still they would be dutiable at 25 per cent.

The district attorney offers in evidence the record in case No. 2, 1896, United States against 563 Diamonds, showing the condemnation of these particular diamonds.

Which said record of said case # 2, United States against 563 Diamonds, is in words and figures as follows, to wit:

142 In the District Court of the United States for the Eastern District of Pennsylvania.

To the Honorable William Butler, judge of the district court of the United States for the eastern district of Pennsylvania:

Be it remembered that on this twenty-seventh day of February, A. D. 1896, before the Honorable William Butler, judge as aforesaid, comes Ellery P. Ingham, Esq., attorney of the United States for the eastern district of Pennsylvania, and, prosecuting in the name and on behalf of the United States and of all persons concerned, propounds and gives the said court to understand and be informed that on or about the 11th day of February, A. D. 1896, the collector of the port of Philadelphia, within the district aforesaid and within the jurisdiction of this court, did seize on board the steamship "Rhynland" certain goods, wares, and merchandise, to wit, five hundred and sixty-three diamonds (563), and the said collector now hath the same in his possession and custody as being forfeited to the United States for the causes of action hereinafter mentioned.

For that heretofore, to wit, on the 11th day of February, A. D. 1896, one Frank Loesewitz, being then and there master of the said steamship "Rhynland," did import and bring into the United States, to wit, into the port of Philadelphia, the said goods, wares, and merchandise, with intent in him to defraud the revenue of the United States, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the

143 United States of America.

And for that heretofore, to wit, upon the said 11th day of February, A. D. 1896, the said Frank Loesewitz, master as aforesaid, knowingly, wilfully, and unlawfully, and with intent to defraud the revenue of the United States, did smuggle and clandestinely introduce into the United States, to wit, into the port of Philadelphia, the said goods, wares, and merchandise as aforesaid, without paying and accounting for the duty imposed upon the same by the provisions of the act of Congress in such case made and provided, which said goods, wares, and merchandise so smuggled and clandestinely introduced into the United States as aforesaid were subject to a duty by law and should have been then and there invoiced, the said Frank Loesewitz then and there well knowing that the duty due and payable upon the said goods, wares, and merchandise had not been paid and accounted for, and that the said goods, wares, and merchandise had not been invoiced as required by the provisions of

the act of Congress in such case made and provided, with intent to defraud the revenue of the United States, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

And for that heretofore, to wit, upon the 11th day of February, A. D. 1896, the said Frank Loesewitz, master as aforesaid, knowingly, wilfully, and unlawfully, and with intent to defraud the revenue of the United States, did import and bring into the United States, to wit, into the port of Philadelphia, the said goods, wares, and merchandise contrary to law, in that due entry was not made of
144 the same by the said Frank Loesewitz, the said goods, wares, and merchandise being then and there, to wit, at the time of entry into the United States at the port of Philadelphia, concealed by the said Frank Loesewitz from the view and inspection of the officer of the United States duly appointed by law to examine the same, to wit, a custom-house inspector, and by subtle means and devices, to wit, by concealing the said goods, wares, and merchandise in a small box, the said Frank Loesewitz did not then and there particularize the contents of the said small box, and the said Frank Loesewitz did not then and there mention the said goods, wares, and merchandise to the said officer, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

Wherefore the said attorney prays the advisement of the court in the premises and the appropriate process and monition, to the end that the said goods, wares, and merchandise may be and remain forfeited and the proceeds of the condemnation be distributed according to the provisions of the act of Congress in such case made and provided.

ELLERY P. INGHAM,
U. S. Attorney.

145 UNITED STATES, } ss:
Eastern District of Pennsylvania, }

The President of the United States to the marshal of the eastern district of Pennsylvania, Greeting:

You are hereby commanded forthwith to seize and attach the following goods, wares, and merchandise, to wit, 563 diamonds imported into the United States on the steamship "Rhynland" by Frank Loesewitz, master of the said steamship, as the same now are, and the same safely keep, to abide the final order and decree of the district court of the United States for the eastern district of Pennsylvania in a certain plea or information herein prosecuted against the said party, &c., by the United States of America, libellants, for forfeiture, &c.; and you are further commanded, in the name and by the authority aforesaid, to cite and admonish the said Frank Loesewitz, master of the said steamship, importer as aforesaid, and generally all others herein concerned, so that they be and appear at a special session of said court, to be holden at Philadelphia on the 13th day of March, A. D. 1896, at ten o'clock in the

forenoon of the same day, then and there to show cause, if any they have, why the said property, &c., should not be condemned as forfeited for the causes in said libel or information set forth; and have you then — there this writ.

Witness the Honorable William Butler, judge of the said [SEAL.] court, at Philadelphia, this 27th day of February, A. D. 1896, and in the 120th year of the Independence the United States.

CHARLES S. LINCOLN,
Clerk District Court United States.

[Endorsed:] No 2 of 1896. District court United States. The United States *vs.* 563 Diamonds Imported into the United States on the Steamship "Rhyneland" by Frank Loesewitz, Master of said Steamship. Attachment. Ret. March 13, 1896. Ellery P. Ingham, U. S. attorney.

146 UNITED STATES, }
Eastern District of Pennsylvania. }

A special district court of the United States will be holden in the city of Philadelphia on Friday, the 13th day of March, 1896, at 10 o'clock a. m., for the trial of a certain information against 563 diamonds imported into the United States in the steamship "Rhynland" for the causes in the libel filed against the same.

By order of the court:

CHARLES S. LINCOLN,
Clerk District Court U. S.

UNITED STATES, }
Eastern District of Pennsylvania, } *ss:*

William W. Craig, being duly sworn, says that a copy of the above notice was posted up in the most public manner at or near the place of trial, to wit, at the outer door of the United States court-room, in the city of Philadelphia, for upwards of fourteen days previous to the time of trial, to wit, from the 27th day of February, 1896, to the 13th day of March, 1896.

W. W. CRAIG.

Sworn and subscribed before me this 13th day of March, A. D. 1896.

CHARLES S. LINCOLN,
Clerk Dist. Court.

[Endorsed:] No. 2 of 1896. District court United States. United States *vs.* 563 Diamonds Imported into the United States in the Steamship "Rhynland." Affidavit of notice of hearing, &c. Filed March 13, 1896.

147 THE UNITED STATES OF AMERICA
vs.
563 DIAMONDS IMPORTED INTO THE UNITED STATES ON THE STEAMSHIP "RHYNLAND," ETC.
U. S. D. C.
Inf. for Forfeiture.
No. 2 of 1896.

And now, this 14th day of April, A. D. 1896, it is adjudged ordered, and decreed that the property, the subject of proceedings in this case, to wit, 563 diamonds imported into the United States on the steamship "Rhynland" by Frank Loesewitz, master of said steamship, be, and the same are hereby, condemned as forfeited for the causes in the said information set forth.

And it is further ordered that the property, the subject of proceedings in this case, be sold by the marshal in the manner and under the notice prescribed by law in cases of goods forfeited.

And, on like motion of the district attorney, order of appraisement of the said property, and Charles F. Gysi is appointed appraiser.

148 UNITED STATES,
Eastern District of Pennsylvania.

William Butler, judge of the district court of the United States for the eastern district of Pennsylvania, to Charles F. Gysi:

You are hereby commanded, in the name and by the authority of the United States, that five hundred and sixty-three diamonds imported into the United States, at the port of Philadelphia, in this district, in the steamship "Rhynland," now in the custody of the marshal, and libelled for forfeiture at the suit of the United States of America, you well and faithfully value and appraise; an indenture containing the true value thereof, under your hands and upon your respective oaths or affirmations, you make and return to me forthwith, at a session of this court now holding at the district court-room, in the city of Philadelphia, together with this writ.

Given under my hand and the seal of the said court, at Philadelphia, this fourteenth day of April, A. D. 1896, and in the one hundred and twentieth year of the Independence of the said United States.

[SEAL.]

W. W. CRAIG,
Clerk District Court U. S.

I, the subscriber, having been appointed appraiser to appraise the property, five hundred and sixty-three diamonds, named in this writ, do swear that I will faithfully and fairly appraise the same and make a true report of the value thereof according to the best of my understanding without unnecessary delay.

CHARLES F. GYSI.

Sworn and subscribed this 17th day of April, A. D. 1896.

CHARLES S. LINCOLN,
Clerk District Court.

[Endorsed:] No. 2. 1896. District court United States. The United States *vs.* 563 Diamonds Imported into the United States in the Steamship "Rhynland." Writ of appraisement.

149 To the Honorable William Butler, judge of the district court of the United States for the eastern district of Pennsylvania:

—; Charles F. Gysi, the subscriber, appointed by the court to appraise the property in the annexed writ described, having been first duly qualified, have in obedience to the said writ appraised the items of property therein mentioned, as the same are now in the custody of the marshal, at the sums placed opposite the same respectively in the following schedule and inventory, amounting in the aggregate to six thousand three hundred and six dollars and sixty cents ($6,306.60).

CHARLES F. GYSI, *Appraisers.*

PHILADELPHIA, 20 *Day of Ap*[illegible]*. D.* 1896.

Inventory and Appraisement of the Diamonds, the Subject of Proceedings in the Cause of Information for Forfeiture.

Five hundred and sixty-three diamonds, No. 2 of 1896, 225$\frac{15}{64}$ kts., appraised at value of $28.00 per kt., amounting to $6,306.60.

CHARLES F. GYSI, *Appraiser.*

150 UNITED STATES, } *sct:*
Eastern District of Pennsylvania, }

William Butler, judge of the district court of the United States in and for the eastern district of Pennsylvania, to the marshal of the same district, Greeting:

You are hereby commanded forthwith, in the name and by the authority of the United States, to sell five hundred and sixty-three diamonds, imported into the United States at the port of Philadelphia, in this district, in the steamer "Rhynland," now in your custody and possession, by virtue of a writ of attachment lately issued out of this court, at the suit of the United States, to the highest bidder at public auction, in the city of Philadelphia, first giving at least fifteen days' notice in one or more of the public newspapers of the said city, the same having been lately condemned as forfeited and ordered to be sold according to law, and the amount of the said sales you are to pay, within ten days thereafter, into the registry of this court, and how you shall have executed this writ do you make return to me on the eighth day of May, 1896, or on the next court day, together with this writ.

Given under my hand and the seal of the said district court, at Philadelphia, this fourteenth day of April, A. D. 1896, and [SEAL.] in the one hundred and 20th year of the Independence of the said United States.

W. W. CRAIG.
Pro Clerk District Court U. S.

[Endorsed:] No. 2, 1896. District court U. S. The United States *vs.* 563 Diamonds Imported into the United States in the

Steamship Rhynland. Writ of sale. Ret. May 8, 1896. James M. Beck, att'y for U. S.

151 In the District Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES *vs.* 563 DIAMONDS IMPORTED, ETC. } Information for Forfeiture. No. 2 of 1896.

SIR: Please issue alias writ of sale as above, returnable *sec. leg.*

JAMES M. BECK,
U. S. Attorney.

To the clerk U. S. D. C., E. D. of Pa.

152 *Ellery P. Ingham.*

THE UNITED STATES OF AMERICA *vs.* 463 DIAMONDS IMPORTED INTO THE United States in the Steamship "Rhynland." } Information for Forfeiture. No. 2 of 1896.

1896, Feb. 27. Libel filed, process awarded, and Friday, March 13, 1894, appointed for time of hearing, of which the clerk to give notice.
" " 28. First proclamation made and no person appears.
" March 6. Second proclamation made and no person appears.
" " 13. Third proclamation made and no person appears.
" " " Affidavit of notice of hearing filed.
" April 10. Writ of attachment returned "attached."
" " 14. Decree of condemnation of the property and order of sale of same and writ of sale exit, returnable May 8, 1896.
Order of appraisement of diamonds, and Charles F. Gysi is appointed appraiser and writ exit.
" " 28. The appraiser returns writ of appraisement and report, which is filed.
" " 8. Writ of sale returned, "proceedings stayed."
" June 1. Præcipe for alias writ of sale filed by James M. Beck, Esq., attorney for the United States, and alias writ of sale exit, returnable June 19, 1896.

153 And the foregoing was all of the evidence offered by the plaintiff, The United States.

And thereupon the defendant, Herman Keck, by his counsel, moved the court for a binding instruction to instruct the jury to return a verdict of "not guilty;" which motion the court overruled, and to which ruling of the court defendant, Herman Keck, then and there excepted; which exception was duly allowed by the court.

The United States having rested its case as aforesaid, the defend-

ant, Herman Keck, and witnesses for the defendant, Herman Keck, were called and sworn and examined as follows, to wit:

154 *Defendant's Evidence.*

JOHN A. CALDWELL sworn.

By Mr. SHIELDS:

Q. You are the mayor of the city of Cincinnati?
A. I am.
Q. Do you know the defendant Keck?
A. I do.
Q. How long have you known him?
A. Some three or four years.
Q. Do you know other people who know him?
A. I do.
Q. Do you know his general character for honesty and fair dealing?
A. I think I do.
Q. What is his reputation there, good or bad?
A. Good.

Cross-examined.

By Mr. BECK:

Q. Have you had any business dealings with him?
A. I never had.
Q. Do you know Coeterman?
A. I do not.

LEOPOLD KLEIBOLIE sworn.

By Mr. SHIELDS:

Q. What is your business?
A. I am president of the Western German Bank of Cincinnati.
Q. How long have you known Mr. Keck?
A. I have known Mr. Keck for the last 11 or 12 years.
155 Q. Do you know many other people that know him?
A. Yes, sir.
Q. Do you know his general character for honesty and fair dealing?
A. Yes, sir.
Q. What is it, good or bad?
A. It is good; very good.
Q. Have you had business transactions with him and his firm?
A. I have always business transactions with him all along; I am his banker.

By the COURT:

Q. His reputation, you say, is good?
A. Yes, sir.

Cross-examined.

By Mr. BECK:

Q. Do you know who Coeterman is?
A. I never saw the man.
Q. Did you ever know of his being in Cincinnati?
A. I never knew he was in Cincinnati.
Q. Do you know who Henrickson is?
A. I know that the man or firm of Coeterman and Henrickson was in Cincinnati about a year and a half ago.
Q. Coeterman and Henrickson live abroad, do they not?
A. I think it is one and the same person.
Q. Coeterman and Henrickson are one and the same person?
A. I think so.
Q. They do not live in Cincinnati?
A. They do not live in Cincinnati.

By the COURT:

Q. Is the defendant a native of Cincinnati?
A. He is a native of Cincinnati. I knew his father well.

156 By Mr. SHIELDS:

Q. You have known the business concern also?
A. Yes, sir; I know it very intimately.

JACOB DORSE sworn.

By Mr. SHIELDS:

Q. What is your business?
A. Manufacturing jeweler.
Q. Where is your place of business?
A. On Race street, Cincinnati.
Q. How long have you been there?
A. I have manufactured there since 1889.
Q. Were you connected with any jewelers' association?
A. I am.
Q. What position?
A. Vice-president of the Manufacturing Jewelers' Association.
Q. Of the State?
A. The city.
Q. You are vice-president?
A. Yes, sir.
Q. Have you had business relations with this gentleman?
A. I have.
Q. You have known him and the firm for how long?
A. I have known him 12 years in business; I have known him almost since he was born.
Q. Do you know many people who know him?
A. Yes, sir.
Q. What is his general character for honesty and fair dealing?
A. Very good.

157 Cross-examined.

By Mr. BECK:

Q. Who is Coeterman?
A. I do not know him.
Q. Did you ever hear of his being in Cincinnati?
A. No, sir.
Q. Who is Henrickson?
A. I do not know him.

LEWIS HUMMEL sworn.

By Mr. SHIELDS:

Q. What is your business?
A. I am in the retail jewelry business.
Q. Where is your place of business?
A. Cincinnati.
Q. Have you had business relations with these gentlemen?
A. I have.
Q. You have bought goods from them?
A. I have.
Q. Do you know the class of goods his firm deals in?
A. I know of them.
Q. Were you an officer of any association?
A. I was several years ago?
Q. That he was connected with?
A. Not that he was connected with.
Q. He was in business, was he, at the time, and you have known him and had business relations with him?
A. I have.
Q. Do you know other people who know him?
A. I do.
158 Q. Do you know his general character for honesty and fair dealing?
A. I do.
Q. Is it good or bad?
A. It is good.

No cross-examination.

EDWARD G. LOMIRE sworn.

By Mr. SHIELDS:

Q. What is your business?
A. Retail jeweler.
Q. How long have you known the defendant, Mr. Keck?
A. I have known Mr. Keck for ten or twelve years, but the firm and his father, I suppose, 23 years.
Q. Do you know many other people who know him?
A. Yes, sir.
Q. Do you know his general character for honesty and fair dealing; is it good or bad?

A. Very good.
Q. Did you ever hear it questioned?
A. No, sir.

No cross-examination.

HERMAN H. LIPPE sworn.

By Mr. SHIELDS:

Q. What is your business?
A. Retail jewelry business in Cincinnati.
Q. How long have you known the defendant?
A. Since he was a boy.
Q. You knew his firm?
A. I knew his father well.
159 Q. Do you know other people who know him?
A. Yes, sir; a great many people.
Q. Do you know his general character for honesty and fair dealing?
A. Yes, sir; it is very good.

Cross-examined.

By Mr. NEWITT:

Q. Do you know Coeterman?
A. No, sir.
Q. Or Henrickson?
A. I do not.

By Mr. SHIELDS:

Q. You were president of the State Jewelers' Association, were you not?
A. Yes, sir; for two terms.
Q. During the time that he was in business?
A. Yes, sir.

Adjourned until May 28th, 1896, at 10 a. m.

160 U. S. D. C., E. D. of Pa.

Butler, J.

UNITED STATES
vs.
HERMAN KECK.

THURSDAY, *May* 28, 1896.

Present: Messrs. Newitt and Beck, for the Government; Messrs. James, Bode and Shields, for defendant.

CONSTANT VAN REETH, having been duly sworn, was examined as follows:

By Mr. SHIELDS:

Q. How old are you?

A. Twenty-four years of age.
Q. What is your father's name?
A. Franz Von Reeth.
Q. Where is your home?
A. In Antwerp.
Q. You have lived there how many years?
A. All my life.
Q. Where did your father live?
A. In Antwerp, too.
Q. He lived there all your life?
A. Yes, sir.
Q. You have lived there together, have you?
A. Yes, sir.
Q. When did your father leave Antwerp?
A. The 9th of March, 1895.
Q. What was his business in Antwerp?
161 A. Diamond-polisher.
Q. How long had he been engaged in that business—as long as you remember?
A. Yes, sir.
Q. What did he come to this country for?
A. To polish diamonds.
Q. Was his name mentioned in the papers at the time he left?

(Objected to.)

Mr. SHIELDS: I offer to prove that at least one year and during a period of one year prior to the 27th day of January, 1896, the name of F. Van Reeth frequently appeared in the public prints of Antwerp, referred to by Captain Loesewitz in his testimony, and that it was well known through the public prints and by the knowledge that the people of Antwerp had that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business.

(Objected to. Objection sustained. Exception allowed for defendant.)

Q. Did you see Mr. Keck in Antwerp in January of 1895?
A. Yes, sir.
Q. Had you any communication with or from him prior to seeing him in Antwerp?
A. I saw Mr. Keck in Antwerp.
Q. Did you have any letter or communication from him prior to that time?
A. Yes, sir.
Q. Where from?
A. From Hanau, Germany.
Q. Do you know where he was on the 27th day of January, in the afternoon?
A. Yes, sir.

By the DISTRICT ATTORNEY:

Q. Of your own personal knowledge, what knowledge have you as to where he was on January 27th?

162 A. I was with Mr. Keck on the afternoon of January 27th.

By Mr. SHIELDS:

Q. Where were you that afternoon and what was he doing?

A. I was with Mr. Keck in the office of Mr. Coeterman.

Q. And Mr. Coeterman is the same Coeterman whose name is used in this corporation in Cincinnati?

A. Yes, sir.

Q. What was he doing there?

A. He was talking with Mr. Coeterman and with me.

Q. How long were you there that afternoon?

A. From three o'clock until five o'clock or half past five.

Q. Explain to the court and jury how you fix that date.

A. Because I received a letter from Mr. Keck on the 26th of January, on Sunday morning, to come on Sunday evening at six o'clock to the Hotel Labriere. I went there. On the 26th of January of this year I received, on Sunday morning, a letter from Mr. Keck. He asked me to meet him in the evening at six o'clock in the Hotel Labriere in Antwerp. At six o'clock I went there and saw Mr. Keck there. I was with Mr. Keck. Then we went to several bars and played billiards until twelve o'clock. I left Mr. Keck. Then he asked me to meet him on the next day, on the 26th of January. He told me to come at three o'clock in the afternoon in the office of Mr. Coeterman. On Monday at three o'clock I went to the office of Mr. Coeterman, where I found Mr. Coeterman and Mr. Keck.

Q. From the time you went into Coeterman's place until you went out, was Mr. Keck out of that place?

A. No, sir.

Q. Was he in the Café Alsacienne at all during that time?

A. I do not know. He has always been with me.

163 Q. Afterwards you came to America with him, did you?

A. Yes, sir.

Q. Did you bring anything with you or did he?

A. No, sir.

Q. In the way of diamonds or any articles in any way, shape, or form?

A. No, sir.

Q. What was the paper that you had? Explain that to the jury.

A. There was a paper that had nothing else except diamonds cut in all the world.

Q. Was there anything dutiable about it or anything wrong about it?

A. No; there was a price-list in Amsterdam.

Q. When you came to New York was your baggage searched and Mr. Keck's? Were you there when his baggage was searched?

A. Yes, sir; we were on the same steamer.

Cross-examination.

By the DISTRICT ATTORNEY:

Q. What was your position at the time that you left Antwerp?

A. Diamond-polisher.
Q. For whom?
A. For Mr. Van Boone.
Q. Who is he?
A. He is a diamond-polisher in Antwerp.
Q. Is he connected with this Mr. Coeterman?
A. Yes, sir.
Q. How is he connected with Coeterman?
A. He is a workman with Mr. Coeterman.
Q. Then you are connected with Mr. Coeterman as a diamond-polisher and not with Mr. Van Bome?
A. Mr. Van Bome was a master.
164 Q. Mr. Van Bome was simply an employé of Coeterman, like yourself?
A. Yes, sir.
Q. And Coeterman is a member of the firm of the Coeterman-Henickson-Keck Company in Cincinnati?
A. Yes, sir.
Q. He lives where?
A. In Antwerp.
Q. His business there is a diamond exporter?
A. Diamond merchant.
Q. He sells diamonds at wholesale and retail? Does he sell simply one single stone in a ring, or does he sell one hundred diamonds at a time?
A. He will sell one stone and more if he can.
Q. Or he would sell one hundred?
A. Yes, sir.
Q. He sells them, not merely set in rings, but he sells them also in the rough?
A. When they are polished he sells them.
Q. They are not set in a condition to wear, but they are polished diamonds sent to America to be set in rings and used that he sells?
A. They polish them and sell them.
Q. They are not set into any setting when he sells them?
A. No, sir.
Q. Have you that letter that you state that Mr. Keck wrote you, that you received on Sunday?
A. No; because I never thought it would be useful to me.
Q. When did you last see that letter?
A. On the same day; on the 26th of January.
Q. You have not seen it since?
A. Oh, no, because I thought I could not use it, and I put it away, and on the 3d of February I left Antwerp.
165 Q. And left the letter there?
A. Yes, sir.
Q. Have you written for that letter?
A. No, sir.
Q. On the 27th you say that this letter stated that you were to meet Mr. Keck at Coeterman's?
A. No; that letter say- I must meet Mr. Keck on the 26th.

Q. Then you made the engagement with him to meet at Coeterman's at three o'clock?

A. Yes, sir.

Q. Keck had business at Coeterman's, did he not?

A. I think it is the same firm.

Q. How long had he been in Antwerp?

A. He had left Antwerp two times.

Q. At that particular time how long had he been in Antwerp, if you know?

A. I do not understand that.

Q. How long had Mr. Keck been in the city of Antwerp when you saw him, as you say, on the 27th inst.?

A. I saw him the first on the 19th of January.

Q. From the 19th of January until the 27th of January he was in Antwerp in connection with business with the Coeterman Company?

A. Yes, sir.

Q. I suppose he was there every day.

A. No, sir; because he had left Antwerp once to go to Hanau.

Q. When he was in Antwerp his headquarters was his business partner's, Coeterman's?

A. He went there; yes, sir.

Q. It was no uncommon thing that he should be at Coeterman's, was it? Whenever he is at Antwerp he makes his business place at Coeterman's, does he not?

166 A. He goes to Coeterman's?

Q. He goes to Coeterman's and transacts his business at Coeterman's when he is in Antwerp?

A. Yes, sir.

Q. Are you prepared to swear to this jury that when you entered Coeterman's that day you took out your watch and noted the time?

A. I didn't take out my watch, but when Mr. Keck asked me to come there at three o'clock, then I called there at three o'clock.

Q. The only reason why you think you were at Coeterman's on Monday at three o'clock was because on the day before he had asked you to be there at three o'clock?

A. Yes, sir.

Q. You did not look at your watch when you entered Coeterman's to see whether it was three o'clock?

A. No. If there is anybody says to me I must come at three o'clock I go at three o'clock.

Q. You do not remember, other than the inference that you think you kept the engagement, that it was three o'clock?

A. Yes, sir.

Q. Did you look at any clock or watch?

A. No, sir.

Q. Or in any way determine whether it was exactly three o'clock when you entered Coeterman's?

A. I do not remember, but I think I left my house a quarter before three o'clock, and then I would be there at three o'clock. I think I looked at my watch before I left my house.

Q. You say you think you looked at your watch before you left your house?

A. Yes, sir.

Q. Are you positive of that, and are you prepared to swear that you looked at your watch?

167 A. Yes, sir.

Q. You are prepared to swear to that positively?

A. Yes, sir.

Q. Why should you remember at this date that you looked at your watch at quarter of three?

A. Because to see what time it was; if it was not time to go to the office.

Q. Was there any special reason why you should look at your watch other than the fact that you were going to be at Coeterman's at three o'clock?

A. Yes, sir; because when they ask me to come at three o'clock I am always on time.

Q. Where had you been prior to going to Coeterman's?

A. At my house.

Q. How long had you been there?

A. From noon.

Q. Had you seen Mr. Keck that day before you saw him at Coeterman's?

A. No, sir.

Q. When you got to Coeterman'- was Keck there?

A. Yes, sir.

Q. How long did you remain there?

A. Until five o'clock or half past five o'clock.

Q. Why do you say to five o'clock or half past five? Did you look at any watch or clock to determine what time it was that you left?

A. No, sir.

Q. What were you doing while you were there?

A. I spoke with Mr. Keck and was reading a newspaper.

Q. How long were you talking to Mr. Keck?

A. A few minutes; read a little and talked a few minutes. I speak more than once with him.

Q. You were reading a newspaper?

A. Yes, sir.

168 Q. And he was attending to his business matters with Coeterman?

A. Yes, sir.

Q. While you were reading the newspaper he could have left that place and returned?

A. No, sir; it was one room.

Q. You were interested in your newspaper, were you not?

A. Not so long. I didn't read so long. I stop always, because when I read too long my eyes hurt.

Q. Had you any special reason for observing whether Mr. Keck left that place on that day and returned?

A. I do not understand that.

Q. Had you any special reason for seeing whether or not Mr. Keck left that place while you were there and returned?

A. I did not see him go out.

Q. Had you any reason for watching Mr. Keck's movements that day?

A. I do not understand the question.

Q. Had you any reason whatever for watching Mr. Keck's movements?

A. What reason I have for seeing Mr. Keck was always there?

Q. I ask you whether there was any reason on that day for your watching Mr. Keck and seeing whether he left the office or not.

A. I cannot answer, because I do not understand it.

Q. When you came there at three o'clock your only purpose was to see Mr. Keck for a few minutes, I understood you to say.

A. I didn't say that.

Q. What is the fact?

A. I say I spoke now a few minutes with Mr. Keck and then a few minutes. I spoke more than once with Mr. Keck.

Q. What was the purpose of Mr. Keck asking you to come there at three o'clock?

169 A. Because every time when he came to Antwerp and he was there I went every day to the office of Mr. Coeterman.

Q. What was the reason for your meeting Mr. Keck at three o'clock at Coeterman's business place?

A. To see him.

Q. Why did you want to see him—you had your work to do?

A. No; at that time I had no work.

Q. What were you going to see him about?

A. To speak with him.

Q. To speak with him on business?

A. As friendship.

Q. Only with friendship?

A. Friendship and about my father over in America.

Q. That was inquiries how your father was getting along, or was it about your father's business?

A. About my father's health and all things.

Q. As a son, you wanted to inquire how your father was getting along in Cincinnati?

A. Yes, sir.

Q. Therefore it is a fact, is it not, that the only purpose you had in seeing Keck was simply, as you say, for friendship, to have a chat with him?

A. Yes, sir.

Q. There was no reason for your meeting Keck at Coeterman's?

A. Yes, sir; for a few things I must send to America.

Q. What were the few things you were going to send to America?

A. Plates to polish diamonds.

Q. Implements to polish diamonds?

A. Yes, sir.

Q. When you got there at three o'clock, did you talk about these plates?

A. Yes, sir.

170 Q. When you had talked about the plates, which took a few minutes, you had then finished your business with Mr. Keck; is not that so?

A. No; then there was a thing that I could not understand what Mr. Keck would say. He asked me the rate of wages and I could not understand what it was.

Q. You asked him about the wages?

A. Yes, sir.

Q. When that was settled your business with Mr. Keck was over, was it not; your business was done with Mr. Keck.

A. At that time; yes, sir.

Q. After that you had no reason to *say* see what Keck did, had you?

A. No.

Q. Did you not say on the deck when the "Aller" came in that you could not speak the English language?

A. When I came in in New York?

Q. Yes.

A. I said I could speak a little.

Q. When you were questioned by the custom-house inspectors did you not refuse to answer because you could not understand the English language?

A. No, sir; I have never refused to answer. I have always explained as much as I could in English.

Q. Do I understand you to say you did not claim to the inspectors that you could not talk English?

A. I spoke a few words at that time.

Q. Did you tell the inspectors that you could not talk English?

A. No; I didn't say I could speak English.

Q. I ask you whether you told the inspectors that you could not talk English.

A. I said I could speak a little.

Q. What language did you speak to Mr. Hess, this gentle-

171 man here? You saw him on the dock?

A. Yes, sir.

Q. What language did you speak to him?

A. English, Flemish, and French; whatever I could do to make him understand.

Q. Did you talk German to him?

A. No, sir; because I can't talk German.

Q. You did not talk German to Mr. Hess?

A. No, sir; I can't talk German.

Q. Is Coeterman here?

A. No, sir.

Q. When was it that the "Aller" sailed from Southampton?

A. On the 5th of February.

Q. You know Von Hemmelrich very well?

A. I know him by sight.

Q. You know he is a diamond merchant in Antwerp?

A. Yes, sir.

Q. How many times have you seen Mr. Keck and Von Hemmel rich together?
A. Never.
Q. All the time Mr. Keck had been in Antwerp you never saw Keck and Von Hemmelrich together?
A. No, sir.
Q. Do you know whether Keck and Von Hemmelrich know each other?
A. I do not know.
Q. Have you been here ever since you came?
A. Since the 14th of February.
Q. You are engaged by this company in Cincinnati?
A. Yes, sir; with my father.

The COURT: Has he said how it is that he knows that this
172 was the 27th of the month? He says that he was there frequently; that was a favorite resort. How does he identify the fact that he met Keck on the 27th? How does he fix that day?

By the DISTRICT ATTORNEY:

Q. How do you fix that date, his honor asks, that it was the 27th of January when you met Mr. Keck at that place?
A. On the 26th of January, on Sunday morning, I received a letter from Mr. Keck that was written in Hanau, Germany.
Q. How do you know it was the 26th?
A. Because it was written on the letter.
Q. How do you happen to remember the particular fact that that letter was the 26th, when you say that from the time you received the letter you did not think it of any importance?
A. Because I saw the date that was on the letter.
Q. How do you happen to remember the date that was on that letter, which you did not think important enough to keep for twenty-four hours?
A. Because it was a week before I left Antwerp.
Q. At the time you received this letter there was nothing in the letter that attracted your attention?
A. Yes, sir.
Q. Had you any special reason for noticing the date of that letter?
A. Because it was just a Sunday between. The 19th of January I saw Mr. Keck for the first time in Antwerp. The second Sunday I received the letter to meet him in the evening, and on the Monday week after I left Antwerp.
Q. This letter you did not think — enough importance to keep on that day; it was simply a note to meet you that night, was it not?
A. Yes, sir.
Q. You did not think it — enough importance to keep?
173 A. No, sir.
Q. Is it not a fact that the reason why you think that letter

was written on Sunday was that after Mr. Keck was arrested you commenced to think back and fixed on the day you received it on?

A. Say that again. I can't understand it.

Redirect examination.

By Mr. SHIELDS:

Q. Have you been in this country since your arrival in Cincinnati all the time?

A. Yes, sir.

Q. You have taken out your first citizen's paper—your declaration of intentions to become an American citizen?

(Objected to. Objection sustained.)

FRANZ VAN REETH, having been duly sworn, was examined as follows:

By Mr. SHIELDS:

Q. How old are you?

A. Forty-six years of age.

Q. Where do you reside?

A. Antwerp or in Cincinnati.

Q. Where do you live now?

A. Cincinnati.

Q. How long have you been in Cincinnati?

A. Fourteen months.

Q. What did you come over here for?

A. To cut diamonds.

Q. Have you been engaged in that business since? Have you been working at it since? Are you manager for the firm?

A. I don't understand you.

174 Q. Have you been cutting diamonds all the time?

A. Yes, sir.

Q. Did you know Captain Loesewitz?

A. Yes, sir.

Q. How long have you known him?

A. Twelve years, I think.

Q. Where have you seen him?

A. In Antwerp.

Q. Whereabouts in Antwerp?

A. In the cafés.

Q. Are any of your friends acquainted—good friends meet with him and you?

A. I do not understand you.

Q. What were you engaged in in Antwerp before you came to this country?

A. Cutting diamonds.

Q. Had your name been in the papers?

A. Yes, sir.

Q. Had you received medals?

The COURT: We will not go into that.

By Mr. SHIELDS:

Q. What big stone did you cut?

The COURT: We will not go into that.

By Mr. SHIELDS:

Q. Are you the father of the last witness?
A. Yes, sir.
Q. Did you have any talk with Mr. Keck at any time about bringing diamonds, smuggling diamonds, or anything of that kind into this country?
A. No, sir.
Q. Did you know that he was going to do so or was going
175 to attempt to do so, or have any knowledge of it?
A. No, sir.
Q. What kind of stones are imported by your firm, cut diamonds or rough?
A. Rough.
Q. What do you do with the rough?

(Objected to.)

Mr. SHIELDS: My purpose is to show that they deal wholly in rough diamonds, that they cannot make any use of the cut diamonds in their business and to follow that up by the people who handle their goods and the people who have seen them; that they never have any of this kind of material in their place at all, so as to show there was no motive on the part of these gentlemen to smuggle this stuff in.

(Objected to. Objection sustained. Exception allowed for def't.)

Cross-examination.

By the DISTRICT ATTORNEY:

Q. What position do you hold with this Coeterman-Henrickson-Keck Company? What do you do for them?
A. Diamond-cutter.
Q. How much do you receive or what wages or moneys do you get from this company for the work that you do?
A. A third of the profits.
Q. What is the firm of Van Reeth & Company? Is there any firm known as Van Reeth & Company?
A. No, sir.
Q. Did you ever hear of a firm of Van Reeth & Company?
A. No, sir.
Q. How did you come to go to America? Who brought you here? Who wrote you to come here to work with this company?
176 A. I understand it, but I can't explain it in English.

By the COURT:

Q. Why did you come to this country?
A. I can't explain it in English.

By the DISTRICT ATTORNEY:

Q. Who asked you to come to this country?
A. Coeterman asked me to come to the country.
Q. Did not Keck ask you to come to this country?
A. No.
Q. How many times has Keck been in Antwerp?
A. No; I don't know.
Q. Many times?
A. I don't know.
Q. How many times have you seen him?
A. Two or three times.
Q. Do you know Van Hemmelrich?
A. Yes, sir.
Q. You did come to this country on an agreement to work for this Cincinnati firm at Coeterman's works; is that right?
A. I don't understand.
Q. Did you come to this country looking for work, or did you come because you were promised work with this particular firm?
A. I was promised work.
Q. You know Von Hemmelrich?
A. Yes, sir.
Q. How many times do you think you have seen Von Hemmelrich and Keck together?
A. Never.
Q. You never saw them together?
A. No, sir.
177 Q. Although Keck has been in Antwerp buying diamonds, and Von Hemmelrich is a diamond dealer, you never saw them together?
A. No, sir; I never saw them together.
Q. You saw them in your shop?
A. I never saw them together.
Q. How many diamond dealers are there in Antwerp?
A. Jewelers and dealers?
Q. Yes.
A. Three or four hundred.
Q. How many years has Von Hemmelrich been there?
A. Von Hemmelrich is a jeweler.
Q. How many years has he been in Antwerp?
A. I think he was born in Antwerp.
Q. He has been there all his life?
A. I think so.
Q. How many years has Coeterman been there?
A. I think he was born there.
Q. Von Hemmelrich is employed by Coeterman, is he not?
A. No, sir.

Q. Was he not?
A. I do not think so.
Q. Have you not seen Von Hemmelrich in Coeterman's place?
A. Yes, sir.
Q. Many times?
A. No, sir.
Q. You have seen him there?
A. Yes, sir.
Q. Engaged in business with Coeterman?
A. No; not the same business.
Q. He came there to talk business with Coeterman?
178 A. To buy diamonds, I think.

By Mr. SHIELDS:

Q. Von Hemmelrich is a retail man, is he not? He is a retail dealer, not wholesale, opposite the Hotel St. Antoine?
A. Yes, sir.
Q. He sells to the people in the hotel?
A. Yes, sir.
Q. That is the kind of business Von Hemmelrich's is?
A. Yes, sir; a jewelry store.

By the DISTRICT ATTORNEY:

Q. Do I understand you to say that the Coeterman-Henrickson-Keck Company do not import cut stones?
A. Rough stones.
Q. Do they not also import cut stones?
A. I do not know.
Q. Do they not polish the stones that have been cut in Antwerp?
A. Yes, sir; in Antwerp.
Q. They import into this country cut stones and polish them here?
A. I do not know. I think not.
Q. How about the firm of Herman Keck Manufacturing Company and the Herman Keck Company, in the same building—do they import cut stones?
A. No, sir; rough stones.

HERMAN KECK, having been duly sworn, was examined as follows:

By Mr. SHIELDS:

Q. How old are you?
A. Thirty-one years old.
Q. Where were you born?
179 A. In Cincinnati.
Q. Whom did you live there with?
A. I lived with my parents.
Q. When did your father die?
A. My father died four years ago.
Q. What business was he engaged in?

A. Manufacturing jeweler.
Q. How long had he been engaged in that business?
A. He had been in that business since the early sixties.
Q. Who succeeded to the business upon his death?
A. We incorporated in 1890.
Q. Was that during your father's lifetime?
A. That was during my father's lifetime.
Q. And the name of that incorporation was what?
A. The Herman Keck Manufacturing Company.
Q. Have you carried on the business after his death?
A. Yes, sir.
Q. You and your brother and your sister?
A. Yes, sir.
Q. You have been carrying on the business?
A. Yes, sir.
Q. And are still engaged in it?
A. We are.
Q. What is the Coeterman-Henricksen-Keck Company? When was that organized?
A. That was organized last May—that is, May, 1895.
Q. What was the business of that concern?
A. The business of the concern was to cut diamonds.
Q. Who composed it? It was organized in the State of Ohio, was it, as appears by the papers?
180 A. It was organized in Ohio, and I managed to get Mr. Coeterman, of Antwerp, interested by putting in some money Mr. Van Reeth and Mr. Coeterman over there *and* put in some money and some Cincinnati parties put in some money.
Q. And that firm was created for the purpose of doing what?
A. For the purpose of cutting diamonds.
Q. Where did you get the diamonds to cut? In what form did you get them to cut?
A. Diamonds in the rough.
Q. Have you imported any cut diamonds at all for this firm?
A. No, sir.
Q. Or for your own firm?
A. For the Herman Keck Manufacturing Company I have.
Q. How long ago?
A. Some time in February.
Q. What were they?
A. Small goods.
Q. Some small ones that you could not cut?

The COURT: We will not go into this. The Government is bound to prove that these special diamonds were smuggled, and the character of the business pursued by these different firms has nothing whatever to do with it.

By Mr. SHIELDS:

Q. When did you go to Antwerp on this last trip?
A. I went to Antwerp in January of this year.

Q. What did you go for?
A. I went to buy rough for the Coeterman-Henrickson-Keck Diamond Cutting Company.
Q. Give to the court and jury what you did, where you went to on that trip, as nearly as you can.
181 A. I had advices from Mr. Coeterman that he expected to buy a large quantity of rough some time in January, and he thought it would be advisable for me to come on and see what kind of rough would be best suited for our American trade. He knows nothing about what would suit our American trade.

The COURT: There is no advantage in going into the business.

Q. You went there to buy diamonds in the rough?
A. Yes, sir. On the 27th day of January the Antwerp syndicate parceled out amongst themselves a lot of rough in the morning. He asked me to be there about two o'clock. I had previously been in Antwerp and made a short trip to Germany. I got back on Sunday night and had written a letter to Constant Van Reeth, asking him to meet me at the Hotel Labriere, which he did. I did this, as he was to hunt up and get me some castings. I had written him from Hanau, Germany.

By Mr. SHIELDS:

Q. When did you meet him?
A. He met me at the Hotel Labriere some time after six o'clock Sunday evening.
Q. What day of the month was that?
A. That was on the 26th day of January. That evening we went to a variety show, and played a few games of billiards. It was about twelve o'clock before he left, and then I told him to be sure to be at Coeterman's office at three o'clock the next day so that we could get these matters arranged about these scouring stones, laps, &c., and we would try and leave for America as soon as possible. I was anxious to get home.
Q. You went there to do your business with the Coeterman's?
A. Yes, sir.
Q. And to get this stuff and material in Antwerp?
182 A. Yes, sir.
Q. Did he meet you at three o'clock?
A. He was there promptly at three.
Q. How long had you been there before he got there?
A. I got there about two o'clock.
Q. How long did you remain there?
A. We remained there until after five.
Q. From there where did you go?
A. From there we went to the Hotel Labriere.
Q. How long did you remain there?
A. I remained there the balance of the evening, as I had some letters to write and some figuring that I wished to do.
Q. You have heard what the captain said. He was under the

impression that you are the man who gave him this package. Did you see him at all on that day?

A. No, sir.

Q. Is there any truth about you receiving the package or being there when a package was delivered, or anything of that kind?

A. The captain must be mistaken.

Q. You are not the man?

A. I am not the man.

Q. When did you leave Antwerp for America?

A. We left the next Monday night, February 3d.

Q. What time did you sail and on what ship?

A. We sailed on February 5th, on the steamer "Aller."

Q. From what place?

A. From Southampton.

Q. That is the reason you left Antwerp Monday?

A. Yes, sir; in order to be there.

Q. You came over and what was done? You were searched
183 as has been said?

A. We landed in New York Friday night.

Q. Tell the story.

A. The steamer got in rather late and the ship's officers refused to give us any definite answer whether we would be able to land that night or not. At the last moment, it seems, a tug came aboard with regular customs officers and that settled that we would be able to land. We hurried down into the room to make our declarations and I made mine and Mr. Van Reeth made his. I then went back to my cabin to see that my baggage was in shape to be landed.

Q. Did anything occur in the cabin while you were there making your declaration?

A. There were some people came around and as I was making my declarations they seemed to look over me.

Q. Looked over what you were doing?

A. Yes, sir.

Q. Up to that time had you seen anybody in reference to this matter or know anything about it? Did you know anything about it at the time?

A. No, sir.

Q. Had anybody spoken to you?

A. No, sir.

Q. After signing the declaration you went to your room?

A. Yes, sir; as I came out of my room a party, who I now recognize as Mr. Gallen, came up to me and said, "Are you Mr. Keck?" I told him, "Yes." "Mr. Keck, of Cincinnati?" I told him, "Yes." "A friend of mine, Captain Loesewitz, has got a little package he asked me to deliver you," and he pulled it out and held it
184 around in his hand. I said, "Captain Loesewitz, I know no man by that name." He says, "I guess I must be mistaken, but he asked me, I being a friend of his, to be careful specially and see you at once when the steamer got in." So I thought nothing more about it. After we got our baggage landed I was surrounded by a number of men and they said they would look through my

baggage. I told them, "All right; nothing to suit me better." They took my one satchel in which I generally kept my old laundry, and there were quite a lot of people on deck, and they threw it out right and left before the people. I objected; I said, "If you are going to examine so closely, can't you take it in a room? It is embarrassing for me to stand before all these people." They gave me no answer. I said nothing more. The party who was examining said, "Mr. Commissioner;" after he got through—he was a little, fat man and had to bend over—he said, "Mr. Commissioner, I am not used to this work. Can't we take the other satchel in on the table?" He said, "Yes." They took the other satchel in on the table. As he got in the room he said, "Mr. Commissioner, you remember we heard some years ago of a party smuggling diamonds in soap. I remember seeing a piece of soap in there. Hadn't we better go in and get it?" He said, "By all means go and get it." He went in and he took the piece of soap out and it was wrapped in a piece of paper and it had got dry and it crumbled all to pieces; then they got the other satchel. I had two little pieces of bort, which is a kind of a black diamond, which is much harder than the ordinary diamond and which is used in the work.

Q. It was what the officer mistook for rough diamonds?

A. It don't look like rough diamond; it was bort.

Q. Such as is used in manufacturing and is admitted free?

185 A. Yes, sir. I had a number of letters there from my wife, my brother, and other parties and a few bills. They got through and I said, "Gentlemen, are you satisfied?" They said, "Not exactly. We will have to take you back to the cabin and see if you haven't got diamonds about you." I told them, "All right." So two of the gentlemen went back with me and looked through my pockets, through my vest, and asked me if I had a bandage, and one looked under my tie to see if I had a diamond on. I did not have any. They said, "It is all nonsense for you to deny you have no diamonds; we know you have some." I said, "Gentlemen, look and if you find them I am satisfied. I have not a diamond about me." One gentleman said, "It is strange that you as a diamond merchant never wear diamonds." I told them, "I am not in the habit of wearing diamonds; I never do." We went back to the room and before I was going to pack up my traps that lay about the table one of the gentlemen says, "We will keep this satchel." I said, "What for?" He said, "We want these papers." I said, "I don't see what you want with those papers. Those are letters from my wife." I said, "By what right can you hold these?" That was Mr. Cummings, and he snickered and said, "We have got them and we are going to keep them. What are you going to do about it?"

The COURT: Come to the question of whether they found any diamonds on you or dutiable property.

A. They found no diamonds or dutiable property.

Q. Or nothing that they claimed to be such?

A. No, sir; nothing whatever.

By Mr. SHIELDS:

Q. Then did they ask you to come with them to Philadelphia? Explain that.

186 A. I told them, "Can't I see Mr. Van Reeth?" They said, "No; you cannot talk to him. We will take him down to Ellis island." I told them that was nice. One gentleman came up and says to me, "We think you have been smuggling diamonds in Philadelphia, and we will ask you to go down there. Are you willing to?" I told him I didn't see why. He said, "We want you to be identified by Captain Loesewitz." I told them all right. Then I wanted to take my baggage again.

Q. You did subsequently come over to Philadelphia, did you not?

A. I was going to, but because they would not let young Van Reeth come along, or let me give him directions as to what he would do, he being a stranger there, I said, "I cannot go."

Q. You did afterwards come to Philadelphia?

A. Yes, sir.

Q. There has been a question asked about your attorney, Mr. Jones, from Cincinnati, meeting you on the wharf. Had you any arrangement or any knowledge that he was going to be there on the wharf at that time?

A. None whatever.

Q. What was he doing in New York on your behalf at that time?

A. He was attending to some legal business for me.

Q. And had been there for some time, had he not?

A. Yes, sir; so he told me.

Q. Were you with Van Himmelrich or did you have any business with him on that day mentioned at all?

A. No, sir.

Q. Was he a customer in any way, shape, or form of yours, or you of his?

A. No, sir.

Q. Did you ever have any business dealings with him or know him?

187 A. Not a cent. I only met him a few times in the many that I went over there. I met him a few times at the office of Mr. Peterman.

Q. How many years had you been going over there?

A. About nine years.

Q. How often a year?

A. Two and three times a year.

Q. Was there ever a suspicion cast upon you prior to this?

(Objected to.)

Q. Have you ever been accused of smuggling?

A. No, sir.

Q. At any time?

A. No, sir.

Q. Or has your firm ever been accused of smuggling?

A. No, sir.

Q. Or anybody connected with your business affairs or concerns, directly or indirectly?

A. No, sir; nobody.

Q. There has been an allegation here by the officer, Mr. Gallen, that you said that that box had no address upon it when you were on the wharf. How did you know that?

A. He put the box plainly in front of me twice. He showed me the box plainly twice. I had seen the box.

Q. You had seen it on the boat?

A. Yes, sir.

Q. What was the effort made; to get you to take it when you were on the boat?

A. He seemed to make an effort; yes, sir.

Q. Were you in the Café Alsation at all on that 27th?

A. No, sir.

Q. It has been stated by the officer that you said you
188 might have been. Their idea was you were in the Victoria, was it not?

A. They mentioned something like Victoria, but I don't know any Victoria there.

Cross-examination.

By the DISTRICT ATTORNEY:

Q. If you remember so positively that you were not in Café Alsacienne on January 27th, why did you answer the officers that you might have been in the Café Alsacienne on that day?

A. He did not mention on the 27th. He mentioned, "Have you ever been in the Café Alsacienne?" I told him I knew no such café.

Q. You said you knew no such café?

A. Yes, sir.

Q. How many times had you been in Antwerp?

A. I have been going there for nine years.

Q. How many times have you been there?

A. Over twenty times.

Q. How many weeks have you been at one time in Antwerp?

A. I go to Antwerp and Amsterdam and Germany. I generally stay a few days.

Q. Sometimes you stay weeks at Antwerp, do you not?

A. Not unless my business requires it.

Q. Your business does require it at times?

A. No, sir; I never stay weeks there.

Q. Why did you say "not unless your business requires it" if you never were there weeks at a time?

A. What I mean is, I can't settle my business in a few days. I go to Amsterdam or Germany—wherever I have business.

Q. Why did you say you were not in Antwerp a few weeks unless your business required it?

A. I go to different parts of Europe and come back to Ant-
189 werp. Antwerp has been my headquarters, and I stay there

a few days if I can do my business; if not, I go on and do otherwise.

Q. That is the only explanation of your answer, in which you said a few moments ago that you never stayed in Antwerp for a few weeks, except when your business required it?

A. I never have stayed in Antwerp for a few weeks.

Q. The Café Alsacienne is in Place Vert, in Antwerp, is it not?

A. So I have learned since.

Q. That is the most prominent square in Antwerp?

A. I think not.

Q. It is a very prominent square in Antwerp?

A. I don't know about that.

Q. It is the square the famous cathedral is very near?

A. It is a square which is full of small cafés.

Q. Do you mean to say, in all your nine years of trips to Antwerp, you never heard of the Café Alsacienne?

A. I never did.

Q. How many times have you met Von Hemmelrich?

A. Possibly three times.

Q. How did you come to meet him?

A. I met him at Coeterman's office.

Q. What was he doing in Coeterman's office?

A. About seven years ago one afternoon I was in Mr. Coeterman's office buying some goods, and we had just gotten through lunch. His office is at his home, and I generally take lunch with him about two o'clock.

Q. I don't care for the details. What was the occasion of Von Hemmelrich seeing Coeterman on the occasions that you were at Coeterman's house and met you there?

A. We had just taken lunch and the gentleman came in,
190 and we were drinking a cup of coffee, and he invited him with him and said, "This, Mr. Von Hemmelrich, is the gentleman who has a nice retail store in Antwerp."

Q. You knew perfectly well Von Hemmelrich buys his diamonds of Coeterman, or a portion of them?

A. I did not.

Q. You knew he had business transactions with Coeterman?

A. I understand that he has.

Q. Prior to 1892 you did not import any stones at all, did you?

A. Certainly.

Q. To any great extent?

A. I do not know how much.

Q. Is it not a fact that until the Coeterman-Henrickson-Keck Company was formed and Coeterman became a partner in it that you commenced to import diamonds to any extent?

A. No, sir.

Q. How long have you been importing?

A. Eight or nine years I have been importing somewhat.

Q. Your importations have very largely increased in the last three years, since Coeterman was in the firm?

A. Since we started cutting there has been more goods imported and put through the custom-house.

Q. What is Coeterman's interest in the firm?

A. He is a stockholder.

Q. To what extent?

A. We started with a capital of a little over $40,000, which we expected to increase.

Q. How much has Coeterman in that firm?

A. He has very little in it now, because he is drawing it out on account of this trouble.

191 Q. Why is he drawing it out?

A. He don't understand why I have nothing but trouble since I started cutting diamonds.

Q. Is that the best explanation why your partner should withdraw from the firm when you are under indictment?

A. That is the only explanation.

Q. He is getting out of the firm since your arrest?

A. Yes, sir; he is afraid——

Q. What is he afraid of?

A. There are certain parties who are prosecuting us, and who are trying to get us to quit the cutting business in Cincinnati, and they are making every effort.

By the COURT:

Q. Does that trouble frighten him away?

A. Yes, sir.

By the DISTRICT ATTORNEY:

Q. He did not start to withdraw the money until you were arrested for smuggling; is not that a fact?

A. That is a fact.

Q. What interest had he just before your arrest; how much interest had he?

A. I think something like six thousand pounds.

Q. That is, $30,000?

A. Yes, sir.

Q. At that time your capital was $40,000?

A. Yes, sir.

Q. So he had $30,000 out of $40,000?

A. Yes, sir.

Q. Tell me why it is that in the articles of incorporation his name is not even mentioned? (Paper shown witness.)

A. He was not present to sign.

192 Q. Notwithstanding the fact that he has three-fourths of all the interest in his firm, his name is not even mentioned in the official paper filed with the secretary of the State of Ohio as having any interest at all.

The COURT: I do not see the relevancy of this. He is not charged with any crime here. That cannot affect this man, except the evidence that will bring the matter home to him.

By the DISTRICT ATTORNEY:

Q. How much interest has he now out of the $30,000?

(Objected to.)

Q. Translate that writing upon that piece of paper (paper shown witness).

A. I don't understand it.

Q. Do you mean to say you do not understand that?

A. Yes, sir; I don't understand it.

Q. What language is it written in?

A. It is either Flemish or Hollandish.

Q. Do you speak Flemish or Hollandish?

A. No, sir.

Q. How is it you were talking on that day to Von Hemmelrich in Flemish?

A. I didn't talk to Von Hemmelrich.

Q. What are the marks on that paper?

A. I do not know.

Q. You do not know what the signs are?

A. No, sir.

Q. What experience have you had in the signs that the diamond-cutters employ?

A. They don't employ any signs; they write.

Q. Who is the legal representative or lawyer of your firm in New York?

A. We have had Mr. Jones.

Q. Mr. Jones is a member of the Cincinnati bar?

A. He attends to most of my business.

193 Q. He is a member of the Cincinnati bar?

A. Yes, sir.

Q. My question is, who is your lawyer in the city of New York?

A. I have no special lawyer.

Q. Have not either you or your firms employed a lawyer in New York?

A. No, sir.

Q. Who is Mr. Martin?

A. I don't know Mr. Martin.

Q. You never heard of Mr. Martin?

A. No, sir.

Q. You never heard of him in connection with this matter?

A. No, sir.

Q. Do you say that upon your oath?

A. I do.

Q. What was Mr. Jones doing in New York? You say in connection with legal business connected with your company?

A. He was taking some testimony.

Q. In what matter?

A. In same labor cases.

Q. Who was your local counsel in new York in that matter?

A. We have no local counsel. Mr. Jones may have some assistance from attorneys, but outside of that I do not know.

Q. Do you not know Mr. Jones has a New York attorney as his assistant?

A. Mr. Jones has talked with several attorneys there.

Q. You know that from Mr. Jones?

A. Yes, sir.

Q. What is the name of the firm in New York associated with him for you?

A. I don't think there is an associate.

Q. Did you not say a moment ago Mr. Jones told you there was a member of the New York bar associated with him?

194 A. I told you Mr. Jones had several times consulted with attorneys there.

Q. Did he not tell you whom they were?

A. I think so.

Q. Whom did he tell you they were?

A. A party in the Mills' building; I can't think of his name just now.

By Mr. SHIELDS:

Q. Is it Lawton?

A. Francis Lawton.

By the DISTRICT ATTORNEY:

Q. Do you not know Mr. Martin is connected with that firm?

A. I know nothing about the affairs of Mr. Martin.

Q. If you say that Mr. Jones happened to be in New York on business, and it was a pure accident that he was at the dock, I would like to know how he happened to be right at the dock as the "Aller" came in?

A. I suppose he knew I was coming.

Q. How did he know that you were coming on the "Aller"?

A. I don't know.

Q. Had you not cabled to this country that you were coming on the "Aller"?

A. I cabled the name of the steamer; that is all.

Q. Mr. Jones knew therefore that you were going to be on the "Aller"?

A. He would have no trouble in finding out from Cincinnati.

Q. And he met you just as the boat came into the dock?

A. Yes, sir.

Q. What was his purpose in meeting you?

A. He said, "How do you do? Did you have a nice trip?"

Q. That was all, was it?

A. Yes, sir. I said, "Yes; I will try and hurry my baggage;" then those other gentlemen walked right in.

Q. What hour was it?

A. It seems to me it was nearly ten o'clock.

195 Q. How many passengers were on the "Aller"?

A. I think there were ninety.

Q. I mean first-cabin passengers?

A. That you can't say. They put them in the passenger list both first and second, I believe.

Q. Do I understand you to say that until you met Captain Loesewitz at the hearing that you had never seen him?

A. Yes, sir.

Q. You had never heard of him?

A. No, sir.

Q. Knew nothing about him?

A. No, sir.

Q. I understand you also that until that day that Gallen came on board the "Aller" and asked you whether your name was "Keck," and you said it was, that you never saw Mr. Gallen?

A. I had never seen Mr. Gallen.

Q. He was a total stranger to you?

A. Yes, sir.

Q. How long was it after six o'clock that you met Mr. Van Reeth in that hotel in Antwerp?

A. He was standing at the entrance of the hotel as I came from the hotel.

Q. What time was it?

A. Shortly after six o'clock.

Q. How do know that? How much after six o'clock?

A. The train gets in about that time.

Q. You have been to Europe since you were indicted?

A. No, sir; I am only indicted since last Monday.

Q. You have been to Europe since you were arrested?

A. Yes, sir.

Q. You went to Antwerp?

196 A. Yes, sir.

Q. How many days were you there?

A. I guess three or four days.

Q. And you saw Von Himmelrich?

A. I did, once.

Q. And you saw Coeterman?

A. Yes, sir; I went there purposely to see him.

Q. You went there to see him about this case?

A. No, sir; to see why he was not sending the rough, as he should.

Q. You did not go to see him about this case?

A. No, sir. We were not getting the rough so we could continue cutting, and I was over on that account. That was my special reason.

Q. That was all you talked about?

A. We talked about a good many things, naturally.

Q. What was the business reason why you should go to Antwerp to see Van Himmelrich, with whom you had no business?

A. I did not say I went to see him. I saw him. He came down to Coeterman's office.

Q. Where did you see him?

A. At Mr. Coeterman's.

Q. At Coeterman's office?

A. Yes, sir.

Q. Did you send for him?
A. Not that I know of.
Q. Would you recognize his writing?
A. I don't know his writing.

By Mr. SHIELDS:

Q. You say you had lunch at Mr. Coeterman's place. Mr. Coeterman's house and place of business are all in one?
A. Yes, sir.

197 By Mr. BECK:

Q. Where were you on January 21st?
A. In Antwerp.
Q. Were you there all that week?
A. I had gone to Hanau in the meantime, in Germany.
Q. When did you go to Hanau?
A. I think it was the 22nd or 23d.

Defense closed.

Government's Rebuttal.

FRANK LOESEWITZ having been recalled.

By the DISTRICT ATTORNEY:

Q. You have heard Mr. Keck testify. State whether or not the voice of Mr. Keck, as you heard it from that stand, is the voice of the man who gave you that package in Antwerp.
A. That is the voice.
Q. Have you any doubt about it?
A. No doubt.
Q. I want to ask you whether or not it is true that that man, F. Van Reeth, knew you and has known you in Antwerp?

(Objected to as already answered.)

Q. Now that you have seen Van Reeth upon the witness stand, which you had not when you testified, I want you to state upon your oath whether or not you ever recollect having seen him before.
A. I don't know him.
Q. Did you ever see him before today?
A. No, sir.

198 FREDERICK HENRICKSON sworn.

By Mr. SHIELDS:

Q. What do you propose to prove by this witness?
The DISTRICT ATTORNEY: To rebut facts brought out on cross-examination that a card was given to Captain Loesewitz upon which there was certain writing. This is the man who is alleged to have given the captain an order for these diamonds.

By the DISTRICT ATTORNEY:

Q. What is your business?
A. Jewelry business.
Q. How many years have you been in that business?
A. About ten years.
Q. Where is your place?
A. 71 Columbia street, Newark, New Jersey.
Q. Have you always been in business there?
A. Yes, sir.
Q. It has been stated here that you gave Captain Loesewitz a card with an order for certain diamonds. State whether that is true or not.
A. I did give Captain Loesewitz a card about a year ago in exchange for one of his.

By the COURT:

Q. What kind of a card?
A. A business card.
Q. Did it contain an order?
A. No, sir.

By the DISTRICT ATTORNEY:

Q. Was there any writing whatever upon it?
A. No, sir.
Q. You say it was about a year ago?
199 A. About a year ago.
Q. Was that the only occasion you ever gave him a card?
A. That was the only occasion.
Q. Did the captain ever bring over any diamonds for you?
A. No, sir.
Q. Did you ever ask him to?
A. No, sir.

Testimony closed.

And this was all of the evidence offered by both the plaintiff, The United States, and the defendant, Herman Keck.

200 And then and thereupon the defendant, Herman Keck, requested the court to give to the jury each and all of the following instructions, to wit:

The court is respectfully requested to give to the jury each of the following instructions:

No. 1. The jury are instructed that there is insufficient evidence introduced in this case to make out the charges against the defendant, Herman Keck, and they are therefore instructed to return a verdict of not guilty on both bills of indictment.

No. 2. The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the first count of each bill of indictment, and they are therefore in-

structed to return a verdict of not guilty as to the first count of both bills of indictment.

No. 3. The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the third count of each bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the third count of both bills of indictment.

No. 4. The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the second count of each bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the second count of both bills of indictment.

201 No. 5. The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment. They are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same or putting the same on his manifest and delivering same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged your verdict must be not guilty.

No. 6. The jury are instructed that as the first count in each bill of indictment insufficiently states any crime against the laws of the United States, said first count in each bill of indictment is to be entirely ignored by them and not considered.

No. 7. The jury are instructed that as the third count in each bill of indictment states that defendant, Herman Keck, imported
202 and brought into the United States, and assisted in so doing contrary to law, as is forbidden in section 3082 of the Revised Statutes of the United States, in this, that he violated section 2802 of the Revised Statutes, which prohibits a person concealing an article subject to duty in the baggage of a person arriving within the United States, which article was not at the time of making entry for such baggage mentioned to the collector, and the evidence in this case wholly fails to show the concealment of any article in baggage, your verdict must be not guilty as the third count in both bills of the indictment.

No. 8. The jury are instructed that the second count in each bill of indictment charges that the defendant, Herman Keck, smuggled and clandestinely introduced into the United States the diamonds mentioned in the indictment, but does not charge him with aiding and abetting therein; and as the section of the statute upon which

this count is based makes a distinction between the doing of an act and aiding and abetting therein, *and* therefore your verdict must be not guilty upon the second count of both bills of indictment.

No. 9. The jury are instructed to scrutinize the testimony of Captain Loesewitz and to consider any interest or bias he may have in the proceeding on trial.

No. 10. The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt. A preponderance of evidence of guilt
203 will not be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt, from the evidence, that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence.

Very respectfully, FRANCIS B. JAMES,
A. S. L. SHIELDS,
Counsel for Defendant, Herman Keck.

204 *Answer of the Court to the Points Presented by the Defendant.*

Each point was read and answered as follows:

No. 1. The jury are instructed that there is insufficient evidence introduced in this case to make out the charges against the defendant, Herman Keck, and they are therefore instructed to return a verdict of not guilty on both bills of indictment.

First. This point is refused.

No. 2. The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the first count of each bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the first count of both bills of indictment.

To the second point the court answers, as it understands this point relates to the form of the counts to which it refers, it is denied.

No. 3. The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the third count of each bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the third count of both bills of indictment.

To the third point the court answers, the court understanding this point as being founded upon the same cause as that just referred to, the court also refuses to affirm it.

205 No. 4. The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the second count of each bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the second count of both bills of indictment.

The fourth point is disaffirmed for the same reason.

No. 5. The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are

further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same or putting the same on his manifest and delivering same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged your verdict must be not guilty.

The court refuses to affirm the fifth point.

206 No. 6. The jury are instructed that as the first count in each bill of indictment insufficiently states any crime against the laws of the United States said first count in each bill of indictment is to be entirely ignored by them and not considered.

The court disaffirms the sixth point.

No. 7. The jury are instructed that as the third count in each bill of indictment states that defendant, Herman Keck, imported and brought into the United States and assisted in so doing, contrary to law, as is forbidden in section 3082 of the Revised Statutes of the United States, in this, that he violated section 2802 of the Revised Statutes, which prohibits a person concealing an article subject to duty in the baggage of a person arriving within the United States, which article was not, at the time of making entry for such baggage, mentioned to the collector, and the evidence in this case wholly fails to show the concealment of any article of baggage, your verdict must be not guilty as to the third count in both bills of the indictment.

The court affirms the seventh point.

No. 8 The jury are instructed that the second count in each bill of indictment charges that the defendant, Herman Keck, smuggled and clandestinely introduced into the United States the diamonds mentioned in the indictment, but does not charge him with aiding and abetting therein, and as the section of the statute upon which this count is based makes a distinction between the doing of an act and aiding and abetting therein, *and* therefore your ver-

207 dict must be not guilty upon the second count of both bills of indictment.

The court disaffirms the eighth point.

No. 9. The jury are instructed to scrutinize the testimony of Captain Loesewitz and to consider any interest or bias he may have in the proceeding on trial.

The court affirms the ninth point.

No. 10. The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt. A preponderance of evidence of guilt will not

be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt, from the evidence, that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistant with any hypothesis of innocence.

The court affirms the tenth point generally, but the meaning ascribed to it by the court is that the jury shall be fully convinced from a careful examination of all the testimony heard that the defendant is guilty of the smuggling charged, as testified to by Captain Loesewitz, and that if it is so convinced beyond room for reasonable doubt it will be justified in finding a verdict of guilty generally and should do so. If it is not thus convinced, the defendant is entitled to an acquittal and should be acquitted.

Defendant's counsel excepted to the refusal of the learned
208 judge to charge as requested in the first, second, third, fourth, fifth, sixth, and eighth points and the answer of the learned judge to the tenth point.

Charge of the Court.

BUTLER, *J.:*

GENTLEMEN OF THE JURY: The several statutory provisions under which the defendant is indicted have been read to you and are doubtless understood. I need not undertake to explain them or to dwell upon the law governing the case. It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true the defendant is guilty of the offense charged.

You have only to determine, therefore, whether it is true. The testimony on the part of the prosecution respecting it is mainly that of the captain himself. The circumstances surrounding him are such as to cast suspicions of guilt on him. He is under indictment for smuggling the diamonds. It may fairly be understood that he believes he is testifying in his own behalf. He stated before you that he hoped at least to improve his situation by appearing here and testifying to what he knows on the subject involved. If, therefore, he stood alone, unsupported, you would naturally and properly hesitate to convict the defendant on his testimony,
209 especially with the defendant's denial, which you have heard.

The Government claims, however, that the captain is corroborated in important particulars, and in such manner that it is not only safe to believe him, but that belief cannot be avoided. The points of corroboration and the matters on which they depend have been referred to and dwelt upon by the district attorney very fully, and I need not further allude to them.

On the defendant's behalf it is claimed not only that the captain is not corroborated, but is contradicted by the defendant's testimony here, as well as by that of young Van Reeth, and also by other facts in the case referred to, and commented upon by his counsel. He

has also produced evidence of good character, which you will consider. Now, from a very careful examination of all the testimony heard on both sides you must determine whether the defendant is guilty or not. If such an examination does not satisfy you beyond reasonable doubt of the defendant's guilt you must acquit him. If it does so fully satisfy you of his guilt you should convict him. The case is very important, and should receive great care at your hands.

There are two indictments and a number of counts in each. If the defendant is found on the evidence to have committed the offence charged in any of the counts he may be returned guilty in manner and form as he stands indicted.

Defendant's counsel then and there excepted to the following portion of the charge of the learned court, the jury being then and there at the bar of the court:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz respecting his receipt
210 of the package of diamonds in Antwerp and bringing them here are true the defendant is guilty of the offence charged."

Which said exception was then and there duly allowed by the court.

And thereupon, inasmuch as the affidavits, evidence, requests for instructions, points, charge of the court, and exceptions do not appear upon the records, the said counsel for the defendant, Herman Keck, did there and then tender this bill of exceptions to the ruling of the court upon the application for a *dedimus potestatem*, to the admission and rejection of evidence, to the refusal of the court at the close of plaintiff's testimony to instruct the jury to render a verdict of not guilty, to the refusal of the court to give each and all of the instructions requested by defendant, Herman Keck, and to the charge of the court to the jury and parts thereof, and to the opinion of the said court, and requested the signature and seal of the judge aforesaid should be put to this bill of exceptions, according to the form of the statute in such case made and provided; and thereupon the aforesaid judge, at the request of the said counsel for the defendant, Herman Keck, did put his signature and seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 9th day of June, A. D. 1896.

WM. BUTLER, [SEAL.]
Dist. Judge.

Agreed to.
JAMES M. BECK,
U. S. Attorney.

211 (*Assignment of Errors.*)

Received in district court and filed June 9th, 1896.

UNITED STATES OF AMERICA:

United States District Court, Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
vs.
HERMAN KECK. } May Session, 1896. No. 20.

Assignment of errors.

Now comes the defendant, Herman Keck, in this action, — in connection with his petition for a writ of error makes the following assignments of errors, which he avers occurred upon the trial of the cause, to wit:

First. The court erred in overruling the motion of the defendant, Herman Keck, to quash each and all of the counts in the bill
212 of *of* indictment; to the overruling of which motion the defendant, Herman Keck, then and there excepted; which exception was duly allowed by the court.

Second. The court erred in overruling the demurrer of the defendant in each and all of the counts of the bill of indictment; to which ruling of the court defendant, Herman Keck, then and there excepted; which exception was then and there allowed by the court.

Third. The court erred in overruling and denying the application of defendant, Herman Keck, for a *dedimus potestatem* to take evidence in pursuance of section 866 of the Revised Statutes of the United States, which evidence was necessary to prevent a failure and delay of justice, and which evidence was to be obtained from witnesses in Antwerp, Belgium, and Amsterdam, Holland; to which ruling of the court *and* overruling *of* said application defendant, Herman Keck, then and there excepted, and which exception was duly allowed by the court.

Fourth. The court erred in sustaining the objection to and overruling the following questions asked by counsel for defend-
213 ant, Herman Keck, of the *of the* witness Frank Loesewitz, first produced by the Government, to wit:

"Q. Wasn't she (the Concha) seized for having on board smuggled goods?

Weren't smuggled goods found right next to your cabin?"

To which ruling of the court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the court.

Fifth. The court erred in overruling the objection made by counsel for defendant, Herman Keck, to the following question asked by the district attorney of the Government witness, John C. Gallen, on direct examination:

"Q. Did the captain give you a description of the man who gave the diamonds to him?"

To which ruling of the court defendant, Herman Keck, then and

there excepted; which exception was then and there allowed by the court.

Sixth. The court erred in overruling the objection made by the counsel for the defendant, Herman Keck, to the following questions asked by the district attorney of the Government witness, John C. Gallen, on direct examination:

214 "Q. I want to ask you whether it was possible for him, Keck, to have seen that there was no address on that package at the time?"

To which ruling of the court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the court.

Seventh. The court erred in overruling the objection made by counsel for defendant, Herman Keck, to the following question asked by the district attorney of the Government witness, John C. Gallen, on direct examination:

"Was the package held by you at that time so that Keck could see it?"

To which ruling of the court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the court.

Eighth. The court erred in sustaining the objection of the United States district attorney to the following question put to the witness Constant Van Reeth, a witness for the defendant, Herman Keck, to wit:

"Q. Was his name mentioned in the papers at the time he left?"

To which ruling of the court defendant, Herman Keck,
215 then and there excepted; which exception was duly allowed by the court; and thereupon defendant, Herman Keck, through Mr. Shields, of his counsel, offered to prove as follows, to wit:

"I offer to prove that at least one year and during a period of one year prior to the 27th day of January, 1896, the name of F. Van Reeth frequently appeared in the public prints of Antwerp and referred to by Captain Loesewitz in his testimony, and that it was well known through the public prints and by the knowledge that the people of Antwerp had that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business."

And then and thereupon United States district attorney objected to said offer of proof; which objection the court sustained, and to which ruling of the court defendant, Herman Keck, then and there excepted; which exception was duly allowed by the court.

Ninth. The court erred in sustaining the objection of the district attorney to the following question put by counsel for defendant, Herman Keck, on the direct examination of Franz Van Reeth:

"Q. What do you do with the rough?"

To which ruling of the court defendant, Herman Keck,
216 then and there excepted; which exception was then and there duly allowed by the court, and then and thereupon Mr. Shields, of counsel for defendant, Herman Keck, made the following offer of proof, to wit:

"My purpose is to show that they deal wholly in rough diamonds; that they cannot make any use of the cut diamonds in their business, and to follow that up by the people who handle their goods and the people who have seen them, that they never had any of this kind of material in their place at all, so as to show that there was no motive on the part of these gentlemen to smuggle this stuff in."

Then and thereupon the district attorney objected to said offer of proof; which objection the court sustained, and then and thereupon defendant, Herman Keck, excepted; which exception was duly allowed by the court.

Tenth. The court erred in making the charge to the jury in refusing to state to said jury and give it the following instructions requested by defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence
217 introduced in this case to make out the charges against the defendant, Herman Keck, and they are therefore instructed to return a verdict of not guilty on the bill of indictment."

To which refusal so to instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the court.

Eleventh. The court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the first count of the bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the first count of the bill of indictment."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the court.

Twelfth. The court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence to
make out a case against the defendant, Herman Keck,
218 upon the second count of the bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the second count of the bill of indictment."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the court.

Thirteenth. The court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and

that Captain Loesewitz received said diamonds with the intention of not invoicing the same or putting the same on his manifest and delivering the same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland,
219 where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged your verdict must be not guilty."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the court.

Fourteenth. The court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that, as the first count in the bill of indictment insufficiently states any crime against the laws of the United States, said first count in the bill of indictment is to be entirely ignored by them and not considered."

To which refusal to so instruct the defendant, Herman
220 Keck, then and there excepted; which exception was then and there duly allowed by the court.

Fifteenth. The court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that the second count in the bill of indictment charges that the defendant, Herman Keck smuggled and clandestinely introduced into the United States the diamonds mentioned in the indictment, but does not charge him with aiding and abetting therein, and, as the section of the statutes upon which this count is based makes a distinction between the doing of an act and aiding and abetting therein and therefor, your verdict must be not guilty upon the second count of the bill of indictment."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the court.

Sixteenth. The court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by defendant, Herman Keck, to wit:

221 "The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt; a preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt from the evidence that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted, which exception was then and there duly allowed by the court, and the court thereupon said it would give a modification of said instruction so requested, and defendant, Herman Keck, thereupon requested the court to give said instructions as asked, which request the court refused, and to which refusal and ruling of the court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the court.

Seventeenth. The court erred in charging the jury, among
222 other things, as follows, to wit:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offence charged."

To which portion of said charge defendant, Herman Keck, then and there excepted while the jury was still at the bar of the court.

Eighteenth. The court erred in overruling the motion of defendant, Herman Keck, to grant him a new trial; to which ruling of the court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the court.

Nineteenth. The court erred in overruling the motion in arrest of judgment of defendant, Herman Keck; to which ruling of the court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the court.

A. S. L. SHIELDS,
FRANCIS B. JAMES,
Counsel for Defendant, Herman Keck.

JAMES & JAMES, *Attorneys.*

223 (*Petition of Defendant for Writ of Error.*)

Received in district court & filed June 12th, 1896.

UNITED STATES OF AMERICA:

Supreme Court of United States.

HERMAN KECK, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error. } May Sess., 1896. No. 20.

Petition of Herman Keck for writ of error.

The petition of Herman Keck respectfully represents as follows, to wit:

That he was indicted in the district court of the United States for the eastern district of Pennsylvania upon a bill of indictment of May sessions, 1896, No. 20; which said indictment was under sections 2865, 3082, and 2802 of the Revised Statutes of the United
224 States, and charged that your petitioner, Herman Keck, knowingly and unlawfully imported into the United States diamonds contrary to law, and smuggled and clandestinely

introduced diamonds and imported diamonds contrary to law, in this, to wit, that he concealed the same.

That on the 26th day of May, 1896, your petitioner, Herman Keck, was arraigned upon said indictment in said court and pleaded "not guilty" to the charges contained in said indictment, and thereupon a jury was called and impanelled and your petitioner was tried before said jury, and on the 29th day of May, 1896, the said jury returned a verdict of guilty.

Your petitioner, Herman Keck, shows that it was claimed upon the part of the United States that while in Antwerp, Belgium, in January, 1896, that your petitioner procured one Van Hemelrich to entrust diamonds to one Captain Loesewitz to be carried into the United States, and your petitioner shows that it was necessary for him to take evidence in Antwerp, Belgium, and Amsterdam, Holland, in order to establish his innocence, which taking of testimony is provided for under the provisions of section 866 of the Revised Statutes of the United States, but the court denied the appli-
225 cation of the provisions of said section to criminal proceedings, and your petitioner was thereafter forced to go to trial without said evidence; that said evidence was necessary and justice required that said dedimus should issue, but the court denied said application.

That at said trial the learned judge refused to allow certain questions to be put to Captain Loesewitz upon cross-examination to impeach his character and to show him to be a notorious smuggler, and refused to allow certain questions to be put to show his knowledge of the name F. Van Reeth, and allowed hearsay testimony to be given by John C. Gallen as to conversations had between John C. Gallen and Captain Loesewitz one day after the arrest of Captain Loesewitz, which conversation related to the identity of Mr. Keck, the petitioner, and the testimony of Captain Loesewitz and your petitioner, Mr. Herman Keck, being in direct conflict, the court refused to allow evidence to be introduced to show that Mr. Keck had no motive to commit the alleged crime of smuggling and unlawful importing, which evidence was admissible to show lack of
226 motive, and was further admissible as relevant to show which story was more probable, that of Mr. Keck, your petitioner, or that of Captain Loesewitz.

That at said trial the learned judge was requested to instruct the jury to return a verdict for defendant of not guilty, which the court ought to have done, as the alleged crime, if any, was not within the jurisdiction of the court; that the alleged crime was not complete; that no attempt was shown by the evidence, and that if there was any intention to smuggle the intention was unexecuted and no attempt was yet made to execute the same; and the court was further asked to instruct the jury to ignore the first count in the indictment, as it charged no crime; and the court was further asked to instruct the jury to find the defendant, Herman Keck, not guilty on the second count because the charge therein made had no evidence in support thereof, all of which said requests the court refused to make and give to the jury.

That exceptions were taken to the general charge of the court wherein the jury was charged that if they believed the story
227 of Captain Loesewitz they must find the defendant guilty.

Your petitioner further shows bill of exceptions has been duly presented to and signed and sealed by the learned judge and filed of record in said court, and further shows that assignment of errors has been duly filed with the clerk of said district court of the United States in accordance with the rules of the Supreme Court of the United States.

Your petitioner further shows that the learned trial court further erred in overruling motions to quash the indictment, demurrers to the indictment, motion for a new trial, and motions in arrest of judgment, all of which appear in the record of said cause and in said assignment of errors.

Wherefore your petitioner, Herman Keck, prays that a writ of error may be allowed in the premises, directed to the district court of the United States for the eastern district of Pennsylvania, and that a citation be issued returnable within thirty days upon the entry of security in whatever sum may be directed; that a supersedeas may be granted and a stay of execution of pro-
228 ceedings in the court below pending such writ of error or appeal, and that your petitioner may be admitted to bail in such sum as the district judge for the eastern district of Penna. may direct.

HERMAN KECH,
By AUGUST H. BODE,
A. S. L. SHIELDS,
FRANCIS B. JAMES, *Counsel.*

AUGUST H. BODE,
A. S. L. SHIELDS,
JAMES & JAMES,
Attorneys.

229 (*Order Allowing Writ of Error and Granting Supersedeas, &c.*)

Received in district court and filed June 12, 1896.

UNITED STATES OF AMERICA:

United States Supreme Court.

HERMAN KECK, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

And now, to wit, this 9th day of June, A. D. 1896, the petition of Herman Keck, praying for a writ of error to the district court of the United States for the eastern district of Pennsylvania, having been read and considered, and the rules of court having been complied with as to the filing with the court below assignments of error, it is ordered that a writ of error be allowed, and that a citation do issue, addressed as prayed for, returnable within thirty days here-

after upon the entry of security in the sum of one thousand dollars; that a supersedeas be granted and a stay of proceedings and execution of sentence imposed by the court below pending this writ
230 of error, and that the said petitioner, Herman Keck, be admitted to bail upon giving bond in such sum as the district judge for the eastern district of Pennsylvania shall direct.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

And a supersedeas bond of the defendant, with surety in the sum of one thousand dollars, approved by the justice of the Supreme Court, being filed, is in the words and figures following, to wit:

231 (*Bond on Writ of Error.*)

Know all men by these presents that we, Herman Keck, as principal, and The Fidelity and Deposit Company of Maryland, as sureties, are held and firmly bound unto the United States of America in the full and just sum of one thousand dollars, to be paid to the said United States of America, their certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this tenth day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a session of district court of the United States for the eastern district of Pennsylvatia, in the month of May, 1896, in a suit depending in said court between The United States of America, plaintiff, and the said Herman Keck, defendant, in a certain bill of indictment of May sess., 1896, No. 20, upon which issue was joined and a trial had before Hon. William Butler, judge of said court, and a jury called and empanelled in said cause, and such proceedings were had that on the 29th day of May, A. D. 1896, a verdict of guilty was rendered against the said defendant, and the said Herman Keck was sentenced to pay a fine of two hundred dollars and be imprisoned in the Eastern penitentiary of the Commonwealth of Pennsylvania for the term of one year and pay the costs of prosecution, and the said defendant, Herman Keck, considering that manifest errors have happened in said trial, to his great prejudice, having presented his petition for a writ of error to the Hon. George Shiras, Jr., of the United States Supreme Court, & having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the verdict in the aforesaid suit, and a citation, directed to the clerk of the district court of the United States for the eastern district of Pennsylvania, commanding him to return the record, so that it be and appear at a Supreme Court of the United States to be holden at the city of Washington, within thirty days:

Now, the condition of the above obligation is such that if the said Herman Keck shall prosecute his writ of error to effect and answer

all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

HERMAN KECK. [SEAL.]
FIDELITY & DEPOSIT CO. OF MD.
[Seal of Comp'y.]
HERMAN HOOPES, *General Agent.*

Seal attached by Herman Hoopes.

Sealed and delivered in the presence of—

—— ——.

Approved by—
JOHN M. HARLAN,
Asso. Justice Sup. Ct. U. S.

232 (*Order of the District Court for the Release of Defendant upon Entry of Bail with Surety in* $10,000.)

Entered June 12th, 1896.

Eastern District of Pennsylvania.

THE UNITED STATES *vs.* HERMAN KECK. } Indictment. No. 20. May Sess., 1896.

And now, to wit, on June 12, A. D. 1896, a writ of error having been allowed in the above case by the Honorable George Shiras, Jr., justice of the Supreme Court of the United States, from the judgment of the district court, and it having been ordered that the defendant be released on bail pending the final determination of the proceedings on said writ of error, and a bond and surety—"The Equitable Trust Company"—in ten thousand ($10,000) dollars having been approved by this court, it is ordered that upon the
233 execution of the said bond by the said Herman Keck, defendant, and said surety before the clerk of the court he be forthwith released from imprisonment and discharged from the custody of the warden of the eastern penitentiary of the Commonwealth of Pennsylvania.

And afterwards, on the 12th day of June, 1896, it appearing that the defendant and said surety had executed said bond, he is discharged from present custody of the warden of the eastern penitentiary of the Commonwealth of Pennsylvania.

The recognizance of the defendant, with surety in ten thousand dollars, being entered accordingly, is in the words and figures following, viz:

234 UNITED STATES, } *ss:*
Eastern District of Pennsylvania, }

We, Herman Keck, residing at No. 616 Lexington avenue, Newport, in the State of Kentucky, and "The Equitable Trust Company," having its office at No. 624 Chestnut street, in the city of

Philadelphia and State of Pennsylvania, acknowledge ourselves to be jointly and severally indebted unto the United States of America in the sum of ten thousand dollars, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenements, upon this condition, that if the said Herman Keck, the defendant, upon whose application a writ of error has been allowed by the Supreme Court of the United States and is now pending, shall be and appear at the district court of the United States for the eastern district of Pennsylvania, upon the determination of the proceedings on said writ of error and the receipt and filing of a mandate or other process or certificate showing the disposition thereof by the Supreme Court, or within five days thereafter, to answer and obey whatever final order or judgment shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

HERMAN KECK. [L. S.]
THE EQUITABLE TRUST CO.,
By DAN'L DONOVAN, *Vice-President.*

[Seal of Company.]

Attest: A. H. O'BRIEN,
Trust Officer.

Taken, acknowledged, and subscribed this 12th day of June, A. D. 1896, in open court.

CHARLES S. LINCOLN,
Clerk District Court.

235 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Charles S. Lincoln, clerk of the district court of the United States for the eastern district of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of the record and proceedings in the said court in a certain criminal cause therein lately depending, to wit, "Indictment No. 20, May sessions, 1896, The United States of America against Herman Keck, defendant," as full and entire as the same now remain among the records of said court in my office, with copy of petition for writ of error, of the assignment of errors, and of the bond on writ of error.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said district court, at Philadelphia, this second day of July, in the year of our Lord one thousand eight hundred and ninety-six, and in the one hundred and twentieth year of the Independence of the United States.

Seal of the District Court of the United States, E. D. Penna.

CHARLES S. LINCOLN,
Clerk District Court United States.

236 Form No. 1.

The Western Union Telegraph Company.

Incorporated.

21,000 offices in America. Cable service to all the world.

This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeated messages, beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.

This is an unrepeated message, and is delivered by request of the sender, under the conditions named above.

THOS. T. ECKERT,
President and General Manager.

Number.	Sent by—	Rec'd by—	Check.
569	Gi.	Jr.	11; collect; ans.

[On the margin:] 221, 124, 1 p.

Received at Corcoran b'ld'g, S. E. cor. 15th & F Sts., Washington, D. C., 12.35 p. m.

Dated Pittsburg, Pa., 11.

JUNE 11, 1896.

To August H. Bode, Wash'n, D. C.:

Justice Shiras gone to mountains of West Virginia for ten days.

W. K. SHIRAS.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the eastern district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States, plaintiff, and Herman Keck, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme

Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 20. May sess., 1896, of indictments. District court U. States, eastern district of Penna. The United States *vs.* Herman Keck. Indictment No. 20, May sess., 1896. Writ of error from the Supreme Court of the United States. Received June 12th, 1896, in clerk's office dist. ct. U. S.

237 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

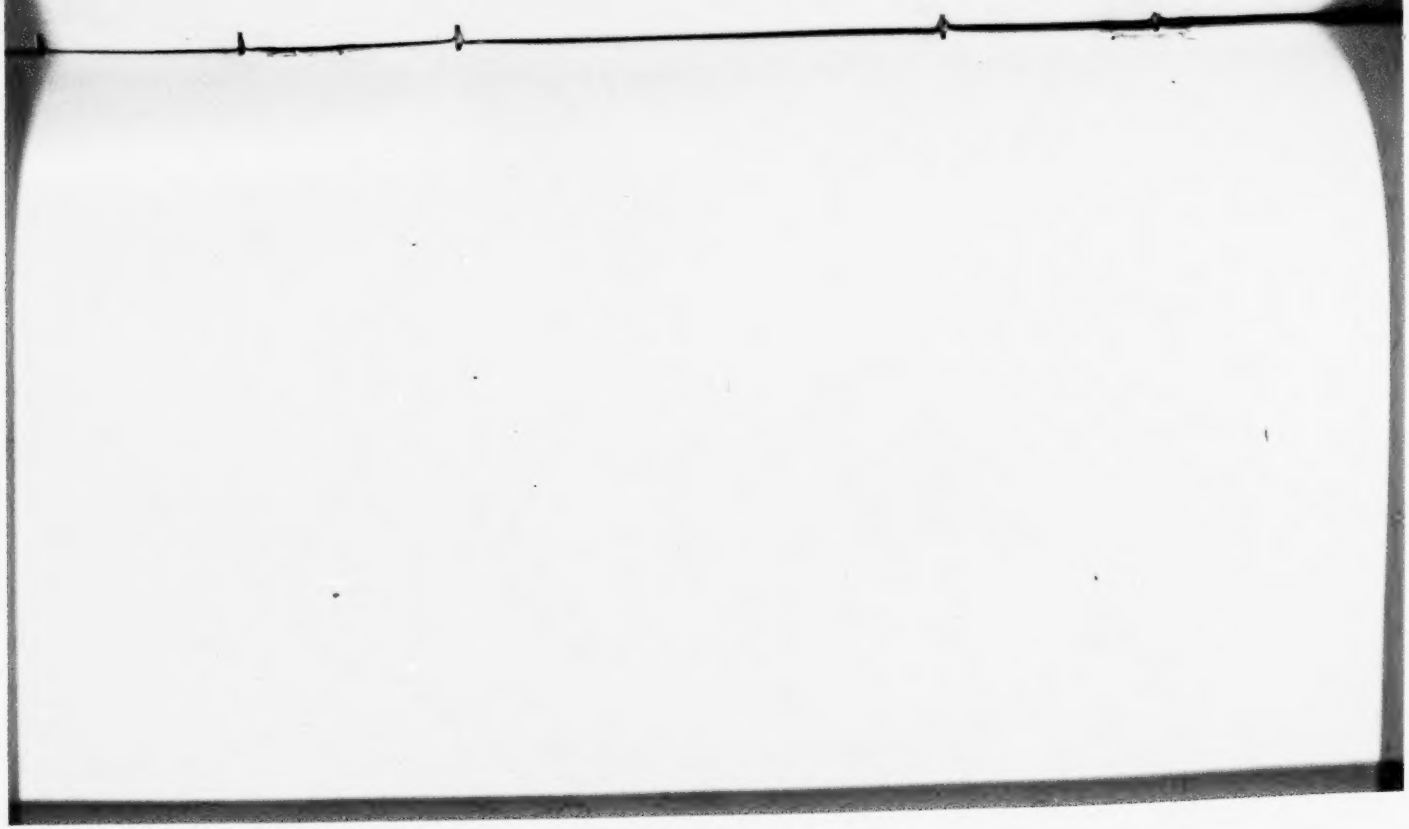
You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the eastern district of Pennsylvania, wherein Herman Keck is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 11th day of June, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

238 [Endorsed:] No. 20. May sess., 1896, of indictments. District court U. States, eastern district of Penna. The United States *vs.* Herman Keck. Indictment No. 20. May sess., 1896. Citation on writ of error and of acceptance of service by the attorney of the United States. Service accepted June 12, 1896 (12th). Harry K. Nevett, ass't U. S. att'y.

Endorsed on cover: Case No. 16,330. E. Pennsylvania D. C. U. S. Term No., 551. Herman Keck, plaintiff in error, *vs.* The United States. Filed July 7, 1896.



No. 551. Oct. Term, 1896. 15.

Brief of Plaintiff in Error.

Brief of Jones v James for P. E.

THE UNITED STATES OF AMERICA.

Filed Dec. 7, 1896.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 551.

DEC 7 1896

HERMAN KECK, Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

RANKIN D. JONES,
FRANCIS B. JAMES,
Counsel for Plaintiff in Error.

JONES & JAMES, Attorneys.

(16,330.)

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EPITOME OF BRIEF.

I.—First Count of Indictment — Questions as to.

(1.) Where a statute which provides for the punishment of a crime does not enumerate the facts constituting the crime, an indictment which follows the language of the statute and does not allege the facts constituting the crime, is fatally defective. (*Post*, page 22.)

(2.) Revised Statutes of the United States, Section 3082, provides for the punishment of any person who shall fraudulently or knowingly import, or bring into the United States, merchandise contrary to law. An indictment, which follows the language of the statute, but does not allege facts showing how the importation or bringing in were contrary to law, or what law they were contrary to, is fatally defective. (*Post*, page 22.)

II.—Second Count of Indictment — Questions as to.

(1.) Where a rate of duty is placed on many species of goods under a generic name, and one specie thereof is specifically named in the free list, such generic name applies to every specie of that class, except the one specified in the free list. While punctuation may be disregarded, it is the duty of a Court to carry out the expressed and not the unexpressed intention of Congress. A Court can not inject into a statute a provision, because it accords with the settled policy of Congress. In interpreting a tariff law, all doubt must be resolved in favor of the citizen. Taxation can only be imposed by a direct, positive provision of law, and every doubt must be resolved in favor of the citizen. (*Post*, page 25.)

(1a.) The Act of August 27, 1894 (28 Stat., 534), paragraph 338, places a duty on precious stones, and paragraph 467 places diamonds on the free-list. An indictment charging the smuggling of diamonds states no crime. (*Post*, page 25.)

(2.) An indictment should directly allege facts constituting a crime, and nothing should be left to conjecture or inference. Although the law defines a crime in generic terms, the indictment

should specify species and descend to particulars. If a generic term covers several things, in reference to some of which a crime may be committed, and as to others a crime can not be committed, the indictment must so particularly describe the same as to specify those as to which a crime may be committed. A mere legal conclusion will not be sufficient. (*Post*, page 25.)

(2a.) If paragraph 338 of the Act of Aug. 27, 1894 (28 Stat., 534), places a duty on some kinds of diamonds; and paragraph 467 places other kinds of diamonds on the free-list, an indictment for smuggling is not sufficient which merely charges the unlawful bringing in of "diamonds," but must specify a kind of diamonds other than those mentioned in the free-list. A mere legal conclusion in such indictment "that they were subject to duty" is not such an allegation, because the facts must be alleged, so an inspection of the record will show as a matter of law that they are subject to duty, and thus amenable to the smuggling law. (*Post*, page 26.)

III. — Second Count of Indictment — No Proper Conviction Under.

(1.) The omission to get a consular invoice for diamonds, a failure to put them on a manifest, the placing them in a state-room of a ship at Liverpool, and the arrival of the ship at Philadelphia, the demand for the diamonds at Philadelphia by a Revenue Officer, who makes himself known as such, and the getting of the diamonds from the state-room, and delivering the same to him, does not constitute smuggling. (*Post*, page 35.)

(2.) There can be no conviction for an attempt to smuggle, on an indictment charging smuggling. (*Post*, page 35.)

(3.) There is a broad distinction between an intent and an attempt; there is a wider distinction between acts which constitute a preparation, and the after overt-acts of an attempt. (*Post*, page 35.)

(3a.) Obtaining diamonds in Europe with the intention of smuggling into America, omitting to get a consular invoice, placing them in a state-room on a ship at Liverpool, omitting them from a ship's manifest, steaming the ship into the port at Philadelphia, accompanied by an intention to smuggle, when nothing more is done, while they may constitute the distinct offenses of omitting from the manifest, or importing contrary to law, do not amount to more than overt-acts of preparation, and there is no overt-act of an attempt to smuggle. (*Post*, page 35.)

(3b.) When such diamonds remain in the state-room of the steamer, where they had been placed at Liverpool, and a Revenue officer boards the ship at Philadelphia, and making himself known as such, demands the diamonds, and the Captain goes to the state-room, gets the diamonds and delivers them up to the officer, there is no overt act of an attempt to smuggle. (*Post*, pages 35–36).

IV. — Evidence Erroneously Admitted.

(1.) A person sworn as a witness should be permitted to state only facts to which he was a percipient witness. If a person claiming to be a percipient witness to facts, declare same to another, the latter, when sworn as a witness, is but a percipient witness to the fact of the declaration, and not to the transaction declared to him. And said declaration is purely hearsay and inadmissible. An exception to this rule arises in cases of declarations made by a conspirator during the continuation of the conspiracy; but declarations made thereafter are hearsay and inadmissible. (*Post*, page 49)

(1a.) When a sea captain claims that a stranger to him in Europe induced him to smuggle diamonds into America, and said sea captain steamed his vessel into the port of Philadelphia, where the diamonds were seized and the captain arrested by a revenue officer, and a day after the seizure the captain gave to the revenue officer a description of the stranger, who, he claims, gave him the diamonds in Europe, but whose name he did not know, it is not competent upon the trial of said stranger on a charge of smuggling for said revenue officer to give testimony as to the description given to him a day after the seizure of the diamonds and the arrest of the captain. Such testimony is incompetent, is hearsay, and does not come within the rule of declarations made by a conspirator during the continuation of the conspiracy. (*Post* page 49.)

(2.) Hearsay evidence is not competent to corroborate the statements of a witness made upon the stand. (*Post*, page 49)

(2a.) A court admitted hearsay evidence. It was all that could be claimed to be corroborative of the evidence of the person claiming to be the only percipient witness to a transaction. The Court charged the jury that if they believed the statements under oath of said percipient witness, they must find the defendant guilty, and said part of the charge was duly excepted to. When the Court further charged the jury that the Government claimed that the percipient witness was corroborated in such manner that it was not only safe to believe, but that belief could not be avoided, and that the points of corroboration had been dwelt upon by the District Attorney very fully, and the Court need not further allude to them, such part of the charge is such a plain error, vital to the defendant, that a reviewing court should correct, although not excepted to, or assigned for error. (*Post*, page 49)

V. — Evidence Erroneously Excluded.

(1.) In every case the following are pertinent hypotheses: (a) the issue made by the pleadings; (b) the truthfulness of a witness; (c) the accuracy of a witness; (d) the bias of a witness; (e) the probability or improbability of the evidence of the witness. It is competent to in-

troduce evidence to prove or disprove any or all of said hypotheses, and such evidence is relevant and admissible, and its weight for the jury. (*Post*, p. 56.)

(1a.) A sea captain testified that while in Europe a stranger procured him to agree to smuggle diamonds into America; that he saw the stranger but fifteen or thirty minutes; that the conversation was carried on in Flemish by a friend of the Captain; that the stranger wrote an address on a piece of paper, and the only thing he said was, "by Adams Express," which was in English; that he did not know the stranger by name, and could only identify him by his face; and that he expected to better his condition by testifying. Said stranger, when on trial charged with said smuggling, denied meeting the Captain, the alleged transaction, and having any conversation with him. Under said circumstances it is competent for said defendant to offer evidence to show that he dealt wholly in rough diamonds, could not make use of the cut diamonds in his business, he never handled diamonds of the character alleged to have been smuggled, and had no motive to smuggle. Such evidence is competent in support of the hypotheses that the Captain was mistaken in his identity, biased in his evidence, and that the evidence of the Captain was improbable and that of the defendant probable. It being thus relevant to pertinent hypotheses, the Court must admit it; its weight is for the jury. (*Post*, p. 56.)

(1b.) On the trial of the said defendant, the said Captain, a resident of Antwerp, testified that when, on January 27, 1896, the diamonds were handed to him by his friend, the stranger (Mr. Keck) wrote on a piece of paper the name T. Van Reeth, 21 W. Fourth St., Cincinnati, and handed it to him; that he kept said paper in his pocket, and produced it for the first time March 18, 1896; the Captain steamed his vessel into the port of Philadelphia, February 11, 1896, was arrested, and the diamonds seized. On his arrest, and thereafter, he claimed to have given a full statement of the receipt of the diamonds and the circumstances surrounding same. After his arrest he made a trip to Europe and returned to testify against Mr. Herman Keck, March 18, 1896, when, for the first time, the Captain produced the paper and claimed that it had existed since January 27, 1896. He denied that he knew Franz Van Reeth, but admitted that he might have seen the name and picture of Franz Van Reeth in the Antwerp newspapers, with the statement that Franz Van Reeth had gone to Cincinnati to cut diamonds. Franz Van Reeth, a diamond cutter and former resident of Antwerp, testified that he had known the Captain for twelve years. Mr. Constant Van Reeth, of Antwerp, a son of Franz Van Reeth, was called as a witness. It was offered to prove by him that the newspaper, which the Captain stated he read, did contain the name and picture of his father, Franz Van Reeth, together with a statement that his father had gone to Cincinnati to cut diamonds. Such testimony was relevant to the pertinent hypotheses that the witness, Captain Frank Loesewitz, was untruthful, biased in not admitting the whole truth; that the paper was spurious, prepared

between the time of his arrest and the time of testifying against Mr. Keck; that the Captain had an opportunity to prepare the same on his revisit to Antwerp between said times; and ought to have been admitted, and it was error for the Court to exclude it. (*Post*, pp. 56–57.)

VI.—Charge of Court to Jury — Part Excepted to.

(1.) Where the counts of an indictment omit substantial allegations, and have been duly demurred to, such omissions can not be supplied by a verdict induced by an instruction of the Court. *Post*, page 69.)

(2.) A charge of a Court to a jury should cover the whole case and not single out parts of the testimony of one witness. The whole case, on all of the evidence, should be submitted to the jury, and the jury must find from all of the evidence that the defendant is guilty beyond a reasonable doubt, and that the evidence is inconsistent with any reasonable hypothesis of innocence and consistent with every reasonable hypothesis of guilt. (*Post*, page 69)

(2a.) The defendant was charged with importing contrary to law and with smuggling diamonds. A sea captain, who claimed that the defendant procured him to smuggle the diamonds, was the only percipient witness to the transaction. He testified (*a*) that a friend in the presence of the defendant gave him the diamonds; (*b*) that the defendant gave him a slip of paper with the name and address of T. Van Reeth thereon; (*c*) that he had been in the habit of bringing over similar small packages, and always reporting them to the revenue officer upon the dock. The Court charged the jury, that if they believed the statements of the Captain, under oath, "respecting his receipt of the package of diamonds in Antwerp and bringing them here," to find the defendant guilty. Such charge is erroneous as not covering the whole case, or the testimony of all the witnesses, or all of the testimony of one witness, and withdraws from the jury certain hypothesis material to the question of guilt. (*Post*, page 69.)

VII.—Answer of Court to Request Number Ten for Special Instruction.

(1.) It is error for a court in answer to the request for a special instruction to affirm said point generally, and at the same time practically withdraw all of the evidence of all of the witnesses from the jury, except two parts of the testimony of one witness. (*Post*, page 77)

(1a.) Defendant requested the Court to charge the jury, that a preponderance of the evidence is not sufficient, but that they must find

the defendant guilty beyond a reasonable doubt from all of the evidence, and that the evidence must be consistent with hypothesis of guilt and inconsistent with any hypothesis of innocence. The Court answered, affirming the request generally, but gave it the meaning that the jury should find the defendant guilty if they believed the defendant guilty of the smuggling charged as testified to by the prosecuting witness. The effect of such charge was to withdraw from the jury all of the evidence of all of the witnesses, except that of Captain Loesewitz, and confined his testimony to so much thereof as pertained to the smuggling charge, as testified to by him. (*Post*, page 77.)

VIII.—Error for Refusing Application for Dedimus.

(1.) Revised Statutes of the United States, Section 866, which provides that any court of the United States may grant a *dedimus potestatem* in any case where it is necessary in order to prevent a failure or delay of justice, applies to criminal cases. (*Post*, page 79.)

(1a.) A person charged with smuggling presented proof in support of an application for a *dedimus* that (a) the prosecuting witness was in the habit and practice of smuggling; (b) that the prosecuting witness had carried a written order to Europe on the business card of a New Jersey merchant for the diamonds which were seized; (c) to show the nature of defendant's business in Europe; (d) that from the amount of the prosecuting witness's income and expenditures, a part of his income was derived from sources other than his wages; (e) record evidence of the prosecuting witness's prosecution for other smuggling transactions; (f) the general bad reputation of the prosecuting witness for truth and veracity. The Court denied the application because the statute did not apply to criminal cases, and that the circumstances did not call for its application at that time; that it did not appear but what witnesses could have been procured; and that the application came too late, and might have been made months before. The refusal of the Court was erroneous, because it made no finding that it was not necessary to prevent a failure or delay of justice, and the action of the Court was based upon a misapprehension of law and fact. (*Post*, page 79.)

IX.—Sentence Erroneous.

(1.) Revised Statutes of the United States, Section 5541, only authorizes a sentence of imprisonment in the penitentiary within the district or State where the court is held where the sentence is for a period longer than one year. If the sentence be for one year, the Court has no power under said Section 5541. (*Post*, page 85.)

(1a.) Where a person was indicted and convicted for a violation of Section 2865, and Section 3082 of the Revised Statutes of the United States, for smuggling and importing contrary to law, in the United States District Court for the Eastern District of Pennsylvania, and sentenced for a period of one year, the Court has no power to order his confinement and imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania. (*Post*, page 85.)

THE UNITED STATES OF AMERICA.

Supreme Court of the United States.

OCTOBER TERM, 1896.

HERMAN KECK, *Plaintiff in Error,* *vs.* THE UNITED STATES, *Defendant in Error.*	No. 551. (16,330)

Brief on behalf of Plaintiff in Error.

MAY IT PLEASE THE COURT:

On behalf of Herman Keck, plaintiff in error, we respectfully submit the following brief, to-wit:

STATEMENT OF THE CASE.

Action to Reverse.— This is an action (original record, pp. 223–229; printed, pp. 118–120) to reverse the judgment of the District Court of the United States for the Eastern District of Pennsylvania, whereby and wherein Herman Keck, plaintiff in error, was convicted by a jury (original record, p. 35; printed, p. 12) of a violation of Sections 2865 and 3082 of the Revised Statutes of the United States, and was by the judgment of the Court sentenced to fine and imprisonment (original record, pp. 45–46; printed, pp. 15–16).

Indictment.— May 18, 1896, at the May Term, 1896, of the District Court of the United States, for the Eastern District of Pennsylvania, an indictment containing three counts was returned against Herman Keck, plaintiff in error (original record, pp. 3–8; printed, 1–2)

First and Third Counts.—The first count charged him in the very language of the statute with importing diamonds contrary to law, contrary to the provisions of Sections 3028 of the Revised Statutes of the United States (original record, pp. 3–4; printed, p. 1). The third count likewise charged him with importing diamonds contrary to law, contrary to the provisions of the same section (3028) of the Revised Statutes of the United States, in that he violated the law by concealing diamonds in a small box, contrary to the provisions of Section 2802 of the Revised Statutes of the United States. (Original record, pp. 6–7; printed, p. 2.)

Second Count.— The second count charged him with smuggling diamonds contrary to the provisions of Section 2865 of the Revised Statutes of the United States (orginal record, pp. 4–6; printed, 1–2).

Application for Dedimus Potestatem.— On the 26th day of May, eight days after the indictment, Herman Keck moved to quash the indictment (original record, pp. 8–12; printed, pp. 3–4). And this motion the Court overruled (original record, p. 13; printed, p. 4). And then he demurred to the indictment (original record, pp. 14–17; printed, pp. 5–6). And this demurrer the Court overruled (original record, p. 17; printed, p. 6). On the same day he filed an application in writing for a dedimus potestatem, to take depositions at Amsterdam, Holland, and Antwerp, Belgium, in pursuance of Section 866 of the Revised Statutes of the United States, because the testimony to be taken was necessary to his defense, and necessary in order to prevent a failure of justice (original record, p. 18; printed, p. 6; original record, p. 47; printed, p. 16). In support thereof he presented an affidavit, setting forth important matters, which

clearly would have been material to him in his defense (original record, pp. 19–28; printed, pp. 6–9; original record, pp. 48–54; printed, pp. 17–20). The Court then and there overruled said application; to which ruling of the Court Herman Keck, plaintiff in error, excepted; which exception was then and there allowed by the Court (original record, p. 54; printed, p. 20), and set forth as number three in the assignments of error (original record, p. 212; printed, p. 114), and set forth in the petition for a writ of error (original record, pp. 224–225; printed, p. 119). The following day the United States presented an answer to the application for the dedimus potestatem (original record, pp. 28–32; printed, pp. 10–11; original record, pp. 54–58; printed, pp. 20–21). On the same day the Court refused the application upon two grounds (original record, pp. 33–34; printed, p. 11; original record, p. 57; printed, p. 22), in the following language, to wit:

"First.— That the statute relied upon is not applicable to the criminal court nor to the trial of causes therein.

"Second.—That if it was, the circumstances shown do not call for its application in this case at this time; that it does not appear that the presence of the witnesses could not have been procured by proper effort, and that if it did appear, it should be held that the application comes too late; that it might have been made months ago and all delay in consequence of granting it avoided."

And defendant excepted, which exception was allowed by the Court (original record, p. 34; printed, p. 12). This is assigned as number three in the assignment of errors (original record, p. 212; printed, p. 114), and set forth in the petition for a writ of error (original record, pp. 224–225; printed, p. 119).

Third Count of Indictment — Questions as to.— The third count of the indictment can be dismissed from discussion, because the evidence wholly failed to support the same, and the learned trial Court, at the request of Herman Keck, plaintiff in error, instructed the jury to return a verdict of

not guilty thereon. (Original record, p. 206; printed, p. 111.) This will then leave for discussion the sufficiency of the first and second counts, the evidence, instructions, charge of court, etc.

First Count of Indictment—Questions as to.—The first count of the indictment was in the very language of the statute, and charged Herman Keck, plaintiff in error, with importing diamonds contrary to law, contrary to the provisions of Section 3082 of the Revised Statutes of the United States. (Original record, pp. 3–4; printed, p. 1.) It reads as follows:

"The grand inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their respective oaths and affirmation, respectively do present that heretofore, to-wit: upon the 11th day of February, in the year of our Lord one thousand eight hundred and ninety, one Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this Court, did knowingly, willfully, and unlawfully, import and bring into the United States, and did assist in importing and bringing into the United States, to-wit: into the port of Philadelphia, certain goods, wares, and merchandise, to wit: Five hundred and sixty-three diamonds of great value, to-wit: of the value of ten thousand dollars, contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States, contrary to the form of the act of Congress, in such case made and provided, and against the peace and dignity of the United States of America."

On May 26, 1896, Herman Keck, plaintiff in error, moved the Court to quash said count in the indictment for various reasons, (original record, pp. 8–13; printed, pp. 3–4), and on the same day the Court overruled the motion (original record, p. 13; printed, p. 4), and this ruling was assigned for error as number one in the assignment in errors. (Original record, pp. 211–212; printed, p. 214.)

On the same day Herman Keck, plaintiff in error, demurred to said first count in the indictment, because the matters therein contained in manner and form as stated were not sufficient in law, and that he was not bound by the law of

the land to answer the same, and that for want of sufficiency of the first count of the indictment, he prayed judgment and dismissal (original record, pp. 14–15; printed, p. 5). The Court overruled said demurrer (original record, p. 17; printed, p. 6), which action of the Court Herman Keck, plaintiff in error, sets forth as his second assignment of error (original record, pp. 211–212; printed, p. 114), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

At the close of all of the evidence, Herman Keck, plaintiff in error, requested the Court to return a verdict of not guilty on the first count in the indictment, because it did not state any crime, and that it should be entirely ignored. The Court refused to give this instruction (original record, p. 206; printed, p. 111). This action of the Court is assigned for error as assignment number fourteen in the assignment of errors (original record, pp. 219–220; printed, p. 117), and set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

Herman Keck, plaintiff in error, moved the Court in arrest of judgment, among other grounds, for the insufficiency of the first count of the indictment (original record, pp. 41–42; printed, p. 14), which motion the Court overruled (original record, p. 222; printed, p. 118). This ruling is assigned as number nineteen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

Second Count of Indictment — Questions as to.— The second count of the indictment charged Herman Keck, plaintiff in error, with smuggling diamonds contrary to the provisions of Section 2865 of the Revised Statutes of the United States (original record, pp. 4–6; printed, pp. 1–2). It reads as follows, to-wit:

"And the grand inquest, aforesaid, inquiring, as aforesaid, upon their respective oaths and affirmations, do further present

that afterward, to-wit, upon the day and year aforesaid, the said Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this Court, did knowingly, willfully, and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to-wit, into the port of Philadelphia, certain goods, wares, and merchandise, to-wit, five hundred and sixty-three diamonds, of great value, to wit, of the value of ten thousand dollars, without paying and accounting for the duty imposed upon the said goods, wares, and merchandise by the provisions of the act of Congress in such case made and provided, which said goods, wares, and merchandise so smuggled and clandestinely introduced as aforesaid were subject to duty by law, and should have been then and there invoiced, the said Herman Keck then and there well knowing that the duty due and payable upon the said goods, wares, and merchandise had not been paid and accounted for, and that the said goods, wares, and merchandise had not been invoiced as required by the provisions of the act of Congress in such case made and provided, with intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

Herman Keck, plaintiff in error, moved the Court to quash this count of the indictment (original record, pp. 10–11; printed, p. 3–4) which motion the Court overruled (original record, p. 13; printed, p. 4); and this is assigned as number one in the assignment of errors (original record, pp. 211–212; printed, p. 114).

A demurrer was then interposed by Herman Keck, plaintiff in error, because said second count and the matters therein contained in manner and form as set forth were not sufficient in law, and that he was not bound by the law of the land to answer the same; and for want of sufficiency of the second count he prayed judgment and a dismissal (original record, p. 15; printed, p. 5), and the Court overruled said demurrer. (Original record, p. 17; printed, p. 6). The overruling of said demurrer is assigned for error as assignment number two in the assignment of errors (original record, p. 212; printed, p. 114), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

Herman Keck, plaintiff in error, moved in arrest of judgment because of the insufficiency of the second count in the indictment (original record, p. 36; printed, p. 12), and the Court overruled said motion in arrest of judgment (original record, p. 45; printed, p. 15). This was assigned for error as number nineteen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

Evidence Erroneously Admitted and Excluded.— There were several errors assigned for the wrongful admission and exclusion of evidence, as follows, to wit:

I.

The United States, to maintain the issues on its part, called, among other witnesses, Captain Frank Loesewitz. (Original record, p. 59; printed, p. 22.)

As appears from the Bill of Exceptions, the story as told by him is substantially as follows: That he was a native, citizen, and resident of Antwerp, Belgium; by occupation a seafaring man and captain of the steamer Rhyland, plying between Philadelphia and Liverpool. On the 27th day of January, 1896, witness made a social call at the residence and place of business of Mr. Van Hammelrick, in Antwerp, Belgium; Van Hammelrick being a friend of twenty-five years' standing, and the owner of a jewelry store. Just as witness was leaving, Mr. Hammelrick came in with a person whom the witness indentified in court as Mr. Herman Keck, the plaintiff in error, and Mr. Van Hammelrick invited witness to go and have a glass of beer. The strange person was introduced, but his name was not given. The three went to the Café Alsacienne, on the place Vert, sat down at a table, and each ordered a glass of beer. The place was crowded, and there were thirty or forty people about. Mr. Van Hammelrick spoke in Flemish. While they were sitting there Mr. Van Hammelrick took a small package from his pocket, showed

it to witness, and said, "This package belongs to that person here," and Van Hammelrick further said to witness, "Will you oblige me to take that over to America? It belongs to him; it belongs to that gentleman; he's a customer of mine; it does not contain any valuables." Witness asked the stranger, "Where shall I send it to?" The stranger tore a piece of paper off a card lying on the table and put an address on it. The name on it was T. Van Reeth, Fourth Street, Cincinnati—either No. 21 or 24, and witness thought 21. Witness put the package and paper in his pocket, and after being at the café a quarter of an hour, the three separated on place Vert, where Mr. Keck told witness to send the package by Adams Express. Witness sailed from Liverpool on January 29, and put the package in his state room and the paper in a card case in his pocket. When the Rhynland reached the port of Philadelphia the following took place, as testified to by the witness Captain Frank Loesewitz (original record, p. 66; printed, p. 27).

"Two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, yes. I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were Treasury agents, and said, Captain, that is a package of diamonds you have got, to be sent to Cincinnati, and if I didn't deliver it I would be arrested. After a while I went down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened."

The witness further testified (original record, pp. 81–82; printed, pp. 36–37) that he had been in the habit of bringing over small packages in the same way he brought this package, and that after the vessel had been docked, he would go to a custom officer on the dock and report the fact. In this case he had not had time to go on the dock, as the Treasury agents came aboard before he had time to go upon the dock.

The witness further testified (original record, p. 82; printed, p. 37) that he had never heard of Mr. Keck, did not recall his name, and the first time he knew his name was when Mr. Gallen, the Treasury officer, came on board of the ship. The witness testified that he had no recollection of the name "Keck," and if Mr. Gallen had said "Johnson," witness would not have known the difference, and all witness knew was the man's face, and that he could not identify him by his name at all, but by his face.

The following illustrates a part of this testimony:

Q. "You did not identify him by his name at all, did you?"
A. "No, not by his name. I identified him by his face."

Herman Keck, plaintiff in error, did not sail on the "Rhynland," was never on the "Rhynland," and was not at Philadelphia. Herman Keck, the plaintiff in error, arrived in New York from Europe on the steamer "Aller," at Hoboken, New Jersey, about the 14th of February, 1896.

Herman Keck's testimony is a direct and categorical denial of the testimony of Captain Frank Loesewitz.

The United States, to further maintain the issue upon its part, called as a witness Mr. John C. Gallen (original record, p. 92; printed, p. 43).

Among the questions asked by the United States District Attorney and objected to by Herman Keck, plaintiff in error, which objection being overruled by the Court, he then and there excepted (original record, pp. 97–98; printed, p. 46), was the following, to wit:

Q. "Did the Captain give you a description of the man who gave the diamonds to him?"
(Objected to. Objection overruled. Exception allowed for defendant.)
A. "Yes sir."
Q. "What was the day when he gave you the description?"
A. "The day after I seized the diamonds."

This action of the Court was assigned for error as number five in the assignment of errors (original record, p. 213; printed, p. 114).

II.

There was a direct conflict between the testimony of Captain Frank Loesewitz and Mr. Herman Keck, the plaintiff in error, and when Mr. Franz Van Reeth was upon the witness stand he was asked certain questions, which were ruled out by the Court. Mr. Franz Van Reeth was manager of the Coetermans-Henrichs-Keck Diamond Cutting Company, of which Mr. Herman Keck was President. The following testimony was offered on behalf of Mr. Herman Keck, plaintiff in error, as relevant, as making probable the testimony of Mr. Herman Keck, and improbable the testimony of Captain Frank Loesewitz (original record, p. 175; printed, p. 93), to wit:

Q. "What kind of stones are imported by your firm, cut diamonds or rough?"
A. "Rough."
Q. "What do you do with the rough?"
(Objected to.)
Mr. Shields: "My purpose is to show that they deal wholly in rough diamonds, that they can not make any use of cut diamonds in their business, and to follow that up by the people who handle their goods and the people who have seen them; that they never have any of this kind of material in their place at all, so as to show there was no motive on the part of these gentlemen to smuggle this stuff in."
(Objected to. Objection sustained. Exception allowed for defendant.)

This ruling of the Court is assigned for error as exception number nine in the assignment of errors (original record, pp. 215–216; printed, pp. 115–116), and is set forth in the petition for writ of error (original record, pp. 225–226; printed, p. 119).

III.

The witness, Captain Loesewitz, called on behalf of the United States, testified that when Mr. Van Hammelrick gave him the package of diamonds, the stranger, whom he identified as Mr. Keck, gave him the slip of paper with the name of T. Van Reeth upon it (original record, p. 62; printed, pp. 24–25), that he did not know Mr. Van Reeth, and that he may have heard the name Van Reeth, may have read the newspapers and seen the name Van Reeth therein. When shown a newspaper with Mr. Van Reeth's picture therein, witness testified that he may have seen it, but did not recollect. The piece of paper upon which Captain Loesewitz testified the stranger had written the name Van Reeth was not produced or spoken of by Captain Loesewitz at his arrest, February 11, at his hearing, February 12, or at any time at any conversation, and was produced for the first time March 18, at the hearing of Mr. Keck before Commissioner Bell. This is testified to by Mr. Gallen, a witness called by the United States (original record, p. 107; printed, p. 52; eleventh line from the bottom).

Mr. Herman Keck, plaintiff in error, produced, among other witnesses, Constant Van Reeth. Among other things he was asked in reference to his father, as follows (original record, p. 161; printed, p. 84), to wit:

Q. "Was his name mentioned in the papers at the time he left?"

A. (Objected to.)

Mr. Shields: I offer to prove that at least one year, and during a period of one year, prior to the 27th day of January, 1896, the name of F. Van Reeth frequently appeared in the public print of Antwerp, referred to by Captain Loesewitz in his testimony, and that it was well known through the public prints, and by the knowledge that the people of Antwerp had that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business.

(Objected to; objection sustained; exception allowed for defendant.)

This ruling of the Court is assigned as number eight in the assignment of errors (original record, pp. 214–215; printed, p. 115).

This testimony was material because Captain Frank Loesewitz, a witness for the United States, testified that he did not know Franz Van Reeth (original record, p. 84; printed, p. 38); and Mr. Franz Van Reeth, a witness for Mr. Herman Keck, testified that he knew Captain Loesewitz (original record, p. 174; printed, p. 92).

General Charge of Court — Exception to.— The story told by Captain Frank Losewitz on the witness stand has been given substantially (this brief, pp. 7–8), and in reference to the same the Court charged the jury as follows (original record, p. 208; printed, 112), to-wit:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To that much of the charge Herman Keck, plaintiff in error, the jury being then and there at the bar of the Court, then and there excepted, which exception was then and there duly allowed by the Court (original record, pp. 209–210; printed, p. 113), and the same appears as assignment number seventeen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for writ of error (original record, pp. 226–227; printed, p. 120).

Special Instructions — Refusal of.— Herman Keck, plaintiff in error, requested the Court to give certain special instructions, which were refused. They were as follows, to wit:

No. 1. The first request made was for a binding instruction to find the defendant not guilty (original record, p. 204; printed, p. 110). This was refused by the Court, and to which refusal an exception was taken (original record, p. 208; printed, p. 112), and was assigned as number ten in the

assignment of errors (original record, pp. 216–217; printed, p. 116).

No. 2. The second request was for a binding instruction to find the defendant not guilty on the first count of the indictment (original record, p. 204; printed, p. 110). This was refused by the Court and an exception noted (original record, p. 208; printed, p. 112), and duly assigned for error as assignment number eleven in the assignment of errors (original record, p. 217; printed, p. 116), and is set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

No. 3. The Court allowed the third request substantially when it allowed request No. 7, which finally disposed of and took the third count of the indictment out of the case (original record, p. 205; printed, p. 110; original record, p. 206; printed, p. 111).

No. 4. The fourth request was for a binding instruction that there was insufficient evidence to make out a case against the defendant, Herman Keck, upon the second count, and that the jury should find him not guilty upon that count (original record, p. 205; printed, p. 110), which was disallowed by the Court and an exception taken (original record, p. 208; printed, p. 112), and is assigned as number twelve in the assignment of errors (original record, pp. 217–218; printed, p. 116), and in the petition for a writ of error (original record, p. 226; printed, p. 119).

No. 5. The Court was requested to give the following as a fifth instruction to the jury (original record, p. 205; printed, p. 110), to-wit:

"The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that, although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received

said diamonds with the intention of not invoicing the same or putting the same on his manifest, and delivering same in America, without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen, said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged, your verdict must be not guilty."

The Court refused to give this instruction, to which an exception was duly taken (original record, p. 208; printed, p. 112), and the same was assigned as number thirteen in the assignment of errors (original record, pp. 218–219; printed, p. 116), and is set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

No. 6. The Court was requested to give a sixth instruction, to ignore the first count, and this has been heretofore set forth (this brief, p. 5; lines 20–27) in reference to the indictment (original record, p. 206; printed, p. 111). The request was refused by the Court and an exception noted (original record, p. 208; printed, p. 112), and is set forth as assignment number fourteen in the assignment of errors (original record, pp. 219–220; printed, p. 117), and set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

No. 7. The Court granted the seventh request, and thus disposed of the third count in the Bill of Indictment (original record, p. 206; printed, p. 111).

No. 8. The Court was requested to give an eighth instruction (original record, p. 206; printed, p. 111), which the Court refused to give, and an exception was noted (original record, p. 208; printed, p. 112), and appears as assignment number fifteen in the assignment of errors (original record, p. 220; printed, p. 117).

No. 9. The Court gave the ninth request (original record, p. 207; printed, p. 111.)

No. 10. Upon the matter of the burden and degree of proof, the Court, in its general charge to the jury, stated as follows (original record, p. 209; printed, p. 113), to wit:

"Now, from a very careful examination of all the testimony heard on both sides, you must determine whether the defendant is guilty or not. If such an examination does not satisfy you beyond reasonable doubt of the defendant's guilt, you must acquit him. If it does so fully satisfy you of his guilt, you should convict him."

Upon this subject Herman Keck, plaintiff in error, requested the Court to give the following instruction to the jury (original record, p. 207; printed, pp. 111–112), to wit:

"No. 10. The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt. A preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt, from the evidence, that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence."

The Court answered this request as follows (original record, p. 207; printed, p. 112), to wit:

"The Court affirms the 10th point generally, but the meaning ascribed to it by the Court is, that the jury shall be fully convinced, from a careful examination of all the testimony heard, that the defendant is guilty of the smuggling charged, as testified to, by Captain Loesewitz, and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilty generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal, and should be acquitted."

Herman Keck, plaintiff in error, duly excepted to the answer of the learned Court, to the request for said instruction number ten (original record, p. 208; printed, p. 112), and the

ruling of the Court was duly assigned as error number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117).

Assignment of Errors.

(Original record, pp. 211–222; printed, pp. 114–118.)

Now comes the defendant, Herman Keck, in this action,—in connection with his petition for a writ of error—makes the following assignment of errors, which he avers occurred upon trial of the cause, to wit:

First.—The Court erred in overruling the motion of the defendant, Herman Keck, to quash each and all of the counts in the bill of *of* indictment; to the overruling of which motion the defendant, Herman Keck, then and there excepted; which exception was duly allowed by the Court.

Second.—The Court erred in overruling the demurrer of the defendant in each and all of the counts of the bill of indictment; to which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there allowed by the court.

Third.—The Court erred in overruling and denying the application of defendant, Herman Keck, for a *dedimus potestatem* to take evidence in pursuance of Section 866 of the Revised Statutes of the United States, which evidence was necessary to prevent a failure and delay of justice, and which evidence was to be obtained from witnesses in Antwerp, Belgium, and Amsterdam, Holland; to which ruling of the Court *and* overruling *of* said application defendant, Herman Keck, then and there excepted, and which exception was duly allowed by the Court.

Fourth.—The Court erred in sustaining the objection to and overruling the following questions asked by counsel for defendant, Herman Keck, of the *the* witness Frank Loesewitz, first produced by the Government, to wit:

Q. "Wasn't she (the Concha) seized for having on board smuggled goods? Weren't smuggled goods found right next to your cabin?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Fifth.—The Court erred in overruling the objection made by counsel for defendant, Herman Keck, to the following question asked by the District Attorney of the Government witness, John C. Gallen, on direct examination:

Q. "Did the captain give you a description of the man who gave the diamonds to him?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there allowed by the Court.

Sixth.—The Court erred in overruling the objection made by the counsel for the defendant, Herman Keck, to the following questions asked by the District Attorney of the Government witness, John C. Gallen, on direct examination:

Q. "I want to ask you whether it was possible for him, Keck, to have seen that there was no address on that package at the time?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Seventh.—The Court erred in overruling the objection made by counsel for defendant, Herman Keck, to the following question asked by the District Attorney of the Government witness, John C. Gallen, on direct examination:

Q. "Was the package held by you at that time so that Keck could see it?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Eighth.—The Court erred in sustaining the objection of the United States District Attorney to the following question put to the witness Constant Van Reeth, a witness for the defendant, Herman Keck, to wit:

Q. "Was his name mentioned in the papers at the time he left?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was duly allowed by the Court; and thereupon defendant, Herman Keck, through Mr. Shields, of his counsel, offered to prove as follows, to wit:

"I offer to prove that at least one year and during a period of one year prior to the 27th day of January, 1896, the name of F. Van Reeth frequently appeared in the public prints of Antwerp and referred to by Captain Loesewitz in his testimony, and that it was well known through the public prints and by the knowledge that the people of Antwerp had that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business."

And then and thereupon United States District Attorney objected to said offer of proof; which objection the Court sustained, and to which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was duly allowed by the Court.

Ninth.—The Court erred in sustaining the objection of the District Attorney to the following question put by counsel for defendant, Herman Keck, on the direct examination of Franz Van Reeth:

Q. "What do you do with the rough?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court, and then and thereupon Mr. Shields, of counsel for defendant, Herman Keck, made the following offer of proof, to wit:

"My purpose is to show that they deal wholly in rough diamonds; that they can not make use of the cut diamonds in their business, and to follow that up by the people who handle their goods and the people who have seen them, that they never had any of this kind of material in their place at all, so as to show that there was no motive on the part of these gentlemen to smuggle this stuff in."

Then and thereupon the District Attorney objected to said offer of proof; which objection the Court sustained, and then and thereupon defendant, Herman Keck, excepted; which exception was duly allowed by the Court.

Tenth.—The Court erred in making the charge to the jury in refusing to state to said jury and give it the following instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence introduced in this case to make out the charges against the defendant, Herman Keck, and they are therefore instructed to return a verdict of not guilty on the bill of indictment."

To which refusal so to instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Eleventh.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the first count of the bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the first count of the bill of indictment."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Twelfth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the second count of the bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the second count of the bill of indictment."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Thirteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamands mentioned in the indictment; they are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same or putting the same on his manifest and delivering the same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged your verdict must be not guilty."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Fourteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to-wit:

"The jury are instructed that, as the first count in the bill of indictment insufficiently states any crime against the laws of the United States, said first count in the bill of indictment is to be entirely ignored by them and not considered."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Fifteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that the second count in the bill of indictment charges that the defendant, Herman Keck, smuggled and clandestinely introduced into the United States the diamonds mentioned in the indictment, but does not charge him with aiding and abetting therein, and as the section of the Statutes upon which this count is based makes a distinction between the doing of an act and aiding and abetting therein and therefor, your verdict must be not guilty upon the second count of the bill of indictment."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Sixteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by defendant, Herman Keck, to wit:

"The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt; a preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt from the evidence that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted, which exception was then and there duly allowed by the Court, and the Court thereupon said it would give a modification of said instruction so requested, and defendant, Herman Keck, thereupon requested the Court to give said instructions as asked, which request the Court refused, and to which refusal and ruling of the

Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Seventeenth.—The Court erred in charging the jury, among other things, as follows, to wit:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To which portion of said charge defendant, Herman Keck, then and there excepted while the jury was still at the bar of the Court.

Eighteenth.—The Court erred in overruling the motion of defendant, Herman Keck, to grant him a new trial; to which ruling of the Court, defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Nineteenth.—The Court erred in overruling the motion in arrest of judgment of defendant, Herman Keck; to which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

ARGUMENT.

I.

First Count of Indictment—Questions as to.

(1.) Where a statute which provides for the punishment of a crime does not enumerate the facts constituting the crime, an indictment which follows the language of the statute and does not allege the facts constituting the crime, is fatally defective.

(2.) Revised Statutes of the United States, Section 3082, provides for the punishment of any person who shall fraudulently or knowingly import, or bring into the United States, merchandise contrary to law. An indictment which follows the language of the statute, but does not allege facts showing how the importation or bringing in were contrary to law, or what law they were contrary to, is fatally defective.

The first count in the indictment is as follows (original record, pp. 3-4; printed, p. 1) to wit:

"The grand inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their respective oaths and affirmations, respectively do present that heretofore, to wit: upon the 11th day of February, in the year of our Lord one thousand eight hundred and ninety, one Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this Court, did knowingly, willfully, and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit: Into the port of Philadelphia, certain goods, wares, and merchandise, to wit: Five hundred and sixty-three diamonds of great value, to wit: of the value of ten thousand dollars, contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

It is based upon the following section of the Revised Statutes of the United States, to wit:

"SECTION 3082. If any person shall fraudulently or knowingly import, or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever on trial for a violation of this section, the defendant is shown to have, or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

The count was confined to the first paragraph of said section, which is in the following language, to wit:

"SECTION 3082. If any person shall fraudulently or knowingly import, or bring into the United States, or assist in so doing, any merchandise contrary to law," etc.

Said first count in no manner stated how the importation and bringing in, were contrary to law, or what law they were

contrary to, but merely alleged the legal conclusion, that they were contrary to law.

It is an elementary rule of criminal pleading, that the defendant should be apprised of the nature of the crime with which he is charged. If, in the case of a statutory crime, the legislative enactment sets forth the facts constituting the offence, it is sufficient if the indictment follow the language of the statute. But when the statute does not set forth the facts constituting the crime, it is not sufficient to repeat the language of the statute in the indictment, but the facts must be alleged. The first count of the indictment is absolutely barren of facts as to how and in what manner the alleged importation and bringing in were contrary to law, or as to what law they were contrary to.

Indictments under the same section (3082) similarly drawn were condemned in the cases of *United States vs. Kee Ho*, 33 Federal Reported, 333 (1887); *United States vs. Claflin*, 13 Blatchford, 178 (1875), and *United States vs. Thomas*, 4 Benedict, 370, 375; S. C. 2 Abbott, 114 (1870). The Supreme Court of the United States applied the same rule under another statute in the case of the *United States vs. Simmons*, 96 U. S. (6 Otto), 360 (1877). Mr. Justice Harlan in delivering the opinion of the Court said, among other things (at page 362), that:

"Where the offence is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.' 1 Bishop, Crim. Proc., Sec. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute."

The same doctrine has been announced in many cases, and no more lucidly than in *State vs. Krueger*, 35 South-Western Reporter, 604, decided by the Supreme Court of Missouri, May 12, 1896. Judge Burgess, in the course of his opinion, goes over the whole ground.

Mr. Herman Keck, plaintiff in error, persistently objected to this count of the indictment by moving to quash (original record, pp. 8–10; printed, p. 3); demurring (original record, pp. 14–15; printed, p. 5); asking for a binding instruction to disregard it (original record, p. 201; printed, p. 109), and moving in arrest of judgment (original record, p. 39; printed, p. 14). The rulings of the Court in denying all of these are assigned as number one (original record, pp. 211–212; printed, p. 114); two (original record, p. 114, printed p. 212); fourteen (original record, pp. 219–220; printed, 117); and nineteen (original record, p. 222; printed, 118), in the assignment of errors. It is also set forth in the petition for a writ of error (original record, pp. 226–227; printed, pp. 119–120). We have heretofore enumerated them in our statement of the case (this brief, pp. 4–5).

II.

Second Count of Indictment—Questions as to.

(1.) Where a rate of duty is placed on many species of goods under a generic name, and one specie thereof is specifically named in the free list, such generic name applies to every specie of that class, except the one specified in the free-list. While punctuation may be disregarded, it is the duty of a Court to carry out the expressed and not the unexpressed intention of Congress. A Court can not inject into a statute a provision, because it accords with the settled policy of Congress. In interpreting a tariff law, all doubt must be resolved in favor of the citizen. Taxation can only be imposed by a direct, positive provision of law, and every doubt must be resolved in favor of the citizen.

(1a.) The Act of August 27, 1894 (28 Stat. 534), paragraph 338, places a duty on precious stones, and paragraph 467 places diamonds on the free-list. An indictment charging the smuggling of diamonds states no crime.

(2.) An indictment should directly allege facts constituting a crime, and nothing should be left to conjecture or inference. Although the law defines a crime in generic terms, the indictment should specify species and descend to particulars. If a generic term covers several things, in reference to some of which a crime may be committed, and as to others a crime can not be committed, the indictment must so particularly describe the same as to specify those as to which a crime may be committed. A mere legal conclusion will not be sufficient.

(2a.) If paragraph 338 of the Act of Aug. 27, 1894 (28 Stat. 534), places a duty on some kinds of diamonds; and paragraph 467 places other kinds of diamonds on the free-list, an indictment for smuggling is not sufficient which merely charges the unlawful bringing in of "diamonds," but must specify a kind of diamonds other than those mentioned in the free-list. A mere legal conclusion in such indictment "that they were subject to duty" is not such an allegation, because the facts must be alleged, so an inspection of the record will show as a matter of law that they are subject to duty and thus amenable to the smuggling law.

The second count of the indictment is as follows (original record, pp. 4–6; printed, 1–2), to wit:

"And the grand inquest aforesaid, inquiring as aforesaid upon their respective oaths and affirmations, do further present that afterwards, towit: upon the day and year aforesaid, the said Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this Court, did knowingly, willfully, and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to wit: into the port of Philadelphia, certain goods, wares and merchandise, to wit: five hundred and sixty-three diamonds of great value, to wit: of the value of ten thousand dollars, without paying and accounting for the duty imposed upon the said goods, wares, and merchandise by the provisions of the act of Congress in such case made and provided, which said goods, wares, and merchandise so smuggled and clandestinely introduced as aforesaid, were subject to duty by law, and should have been then and there invoiced, the said Herman Keck then and there well knowing that the duty due and payable upon the said goods, wares, and merchandise had not been paid and accounted for, and that the said goods, wares, and merchandise had not been invoiced as required by the provisions of the act of Congress in such case made and provided, with the intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case as made and provided, and against the peace and dignity of the United States of America."

This count of the indictment is based upon the following provisions of Section 2865 of the Revised Statutes of the United States, as amended February 27, 1877, 19 United States Statutes at Large, Chapter 69, p. 247, to wit:

"If any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce, into the United States any goods, wares, or merchandise, subject to duty by law, and which

should have been invoiced, without paying or accounting for the duty, or shall make out or pass, or attempt to pass, through the custom-house any false, forged or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the Court."

The insufficiency of this count of the indictment was persistently questioned by Mr. Herman Keck, plaintiff in error, who successively moved to quash the same (original record, pp. 10–11; printed, pp. 3–4), demurred thereto (original record, p. 15; printed, p. 5), moved the Court to instruct the jury to return a verdict of not guilty thereon (original record, p. 200; printed, p. 109), and moved the Court to arrest the judgment (original record, pp. 36, 40; printed, pp. 12, 14).

The Court overruled the motion to quash, the demurrer, the request for a binding instruction, and the motion in arrest of judgment, and the same are assigned as number one (original record, p. 211–212; printed, p. 114), two (original record, p. 212; printed, p. 114), twelve (original record, p. 217; printed, p. 116), and nineteen (original record, p. 222; printed, p. 118), in the assignment of errors. We have heretofore enumerated them in our statement of the case (this brief, pp. 5–7).

This count of the indictment is insufficient for one of two reasons. In the first place, diamonds are on the free list and are not subject to duty. In the second place, if not on the free list, some kinds of diamonds are undoubtedly on the free list, and the indictment should have specifically described diamonds which are subject to duty.

First. In the first place, diamonds are upon the free-list. The act of August 27, 1894 (28 U. S. Statutes at Large, Chapter 349, pp. 509–571), is entitled "An act to reduce taxation, to produce revenue for the Government, and for other purposes." The first section reads as follows, to wit:

"That on and after the first day of August, 1894. *unless otherwise specially provided for in this act*, there shall be levied, collected, and paid upon all articles imported from foreign countries, or withdrawn for consumption, and mentioned in the schedule herein contained, the rates of duty which are, *by the schedules and paragraphs respectively prescribed*, namely:"

Under "Schedule N — Sundries" — division entitled "Jewelry and Precious Stones," is found the following paragraph (p. 534), to wit:

"338. Precious stones of all kinds, cut, but not set, twenty-five percentum *ad valorem;* if set and not specially provided for in this act, including pearls set, thirty per centum *ad valorem;* imitations of precious stones, not exceeding an inch in dimensions, not set, ten per centum *ad valorem*. And on uncut precious stones of all kinds, ten per centum *ad valorem*."

If this were the only schedule and paragraph of the tariff law, it is clear that diamonds would fall under the generic term of "precious stones." But under the title of the "free list" is found the following schedule (p. 539), to wit:

"467. Diamonds; miners', glaciers', and engravers' diamonds not set, and diamond dust or bort, and jewels to be used in the manufacture of watches or clocks."

This specific provision takes diamonds out of the general class of precious stones, and makes them non-dutiable. *Arthur vs. Rheims*, 96 U. S., 143 (1877); *Arthur vs. Lahey*, 96 U. S., 112 (1877). While the punctuation, in the use of a semicolon, may be disregarded, it is the duty of the Court to carry out the expressed and not the unexpressed intention of Congress. *United States vs. Schilling*, 11 U. S. App., 603 (1892). A Court can not inject into a statute a provision because it is the Court's belief that such provision accords with the settled policy of Congress. *Bate Refrigerating Co. vs. Sulzberger*, 157 U. S., 1 (1894). If we were to concede, for the sake of argument, that a case of doubt arose, such doubt must be resolved in favor of the citizen whose property is to be taxed. Taxation should always be imposed by direct, positive provisions

of law, and not by implication, construction, or conjecture. Every doubt must be resolved in favor of the citizen. *Henderson vs. The United States*, 66 Federal Rep., 53, 56 (1895); *Adams vs. Bancroft*, 3 Summer, 384, 387 (1838); *United States vs. Wigglesworth*, 2 Story, 369, 373–374 (1842); *Powers vs. Barney*, 5 Blachford, 202 (1863); *United States vs. Isham*, 17 Wallace, 496, 504 (1873); *Hartranft vs. Wiegmann*, 121 U. S., 609, (1896); *American Net and Twine Co. vs. Worthington*, 141 U. S., 468 (1891).

Second. If we be wrong in the contention that all diamonds are on the free-list, our position is that as some diamonds are on the free-list under paragraph 467 (page 539), and other diamonds dutiable under paragraph 338 (page 534), the indictment should have described dutiable diamonds. Paragraph 338 (page 534) specifies that precious stones of all kinds, cut but not set, should pay a duty of twenty-five per centum *ad valorem;* if set and not specially provided for in the act, including pearls set, thirty per centum *ad valorem;* and uncut precious stones of all kinds, ten per centum *ad valorem.* As paragraph 467 (page 539) specifies certain diamonds which are free and which come within the language of paragraph 338 (page 534), except that they are specially provided for, the indictment should, in describing the offense, have described the diamonds which are dutiable, because *non constat* the diamonds charged in the indictment might be non-dutiable. For all that appears in the indictment, the diamonds imported might be the diamonds specified in paragraph 467 (page 539), which are on the free list. It is not sufficient for the indictment to allege that they were subject to duty, because this is a conclusion, but the indictment should have specifically alleged that they were diamonds other than miners', glaciers', and engravers' diamonds, not set. The Court could then say that the diamonds were dutiable from an inspection of the record. This goes to the description of the offense.

Every act is presumed to be lawful, unless it be charged to be done under circumstances which render it criminal. For all that appears from the allegations of fact in the second count of the indictment, the diamonds were engravers', glaciers', and miners' diamonds, and are not to be presumed to be diamonds other than miners', glaciers', and engravers' diamonds. The indictment must show upon its face by allegations of fact that a crime was committed. The Court must be able to tell upon the reading of the indictment from the facts therein alleged that a crime was committed. For aught that appears in the indictment, the diamonds alleged to have been smuggled, may have been miners', glaciers', and engravers' diamonds. Defendant must be apprised by the allegations of fact in the indictment of the crime with which he is charged, and the charge ought not be left to conjecture. These rules have been illustrated in many decided cases; and no more forcibly than in the case of the *Commonwealth vs. Bean*, 11 Cushing (Mass.), 414. In this case the Revised Statutes of Massachusetts (Chapter 126, Section 42) punished any person who should maliciously or wantonly break the glass, or any part of it, in any building not his own. The indictment averred that the defendant maliciously and wantonly broke the glass, to wit: two panes of glass in a certain building not the property of the defendant. After a verdict of guilty the defendant moved in arrest of judgment, because the indictment did not allege that the glass broken was a part of the building, but only that it was in a building not his own. Mr. B. F. Butler appeared as counsel for the defendant and Mr. R. Choate, the Attorney-General, on behalf of the Commonwealth. Judge Metcalf, who delivered the opinion of the Court, said (at pp. 414–5), as follows:

"It is admitted by the counsel for the Commonwealth, that the section of the statute on which this indictment is framed, was intended to punish the malicious and wanton breaking of

glass which is part of a building. And it is argued by him that the words used in the indictment, being the same as those in the statute, must be held to have the same meaning. But this does not necessarily follow. The meaning of words in the statute may be and not unfrequently must be ascertained by examination of the context. In the present case, it is from the context that the words glass in a building are understood on all hands to mean glass which is part of a building. But the Court, in ascertaining the offense with which the defendant is charged, can not look beyond the words of the indictment itself. If those words do not sufficiently charge the offense which the statute was meant to punish, the indictment is fatally defective. 2 Hawk. c. 25, Sec. 111; *Commonwealth vs. Slack*, 19 Pick. 304; *Commonwealth vs. Clifford*, 8 Cush., 215; *Commonwealth vs. Stout*, 7 B. Monroe, 247. We are, therefore, of opinion that the indictment in this case will not sustain a judgment against the defendant. *For aught that the indictment shows, the glass, which he is charged with having maliciously and wantonly broken, may have been panes of glass which were not a part of any building.* Judgment arrested."

So likewise in *Commonwealth vs. Newburyport Bridge*, 9 Pick, 142 (1829). In this case the indictment charged the defendants with having neglected to provide a proper draw, and thereby prevented vessels and river craft from passing the bridge. The defendants moved in arrest of judgment because the indictment did not allege that any bridge had been built. The Court sustained this position in the following opinion (at p. 142), to wit:

"The answer to the first objection is, that the defendants completed the bridge and took toll; and if so we think they were bound to provide the means prescribed by the statute to enable vessels to pass with convenience through the draw. But we think the objection that the indictment does not allege that any bridge has been built is fatal. It may be, indeed, inferred by any common reader that there was a bridge; but no lawyer considering that inferences are not to be made in criminal cases would say it appears that a bridge had been built. There ought to have been an express allegation to that effect."

The indictment in the case of *United States vs. Cruikshank*, 92 U. S., 542 (1875) was for a violation of section six of the act of May 30, 1870, 16 U. S. Stat. at Large 140, and known as

the "Enforcement Act." The counts reviewed by the Court substantially charged the defendant with a conspiring to deprive certain citizens of African descent of their rights and privileges under the Constitution of the United States. The indictment omitted to state the facts, but merely charged the crime in the language of the statute, and did not specify any particular right of which the said citizens were deprived. The Court said it was unimportant that the indictment described a statutory offense in the language of the statute, but the question was whether any offense had been described at all; that there was no specification of any particular right, although the language of the indictment was broad enough to cover all.

Chief Justice Waite, in delivering the opinion of the Court, said (at pp. 557–8), as follows:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." Amendment VI. In *United States vs. Mills*, 7 Pet., 142, this was construed to mean, that the indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged; and in *United States vs. Cook*, 17 Wall, 174, that every ingredient of which the offense is composed must be accurately and clearly alleged. It is an elementary priciple of Criminal Pleading that *where the definition of an offense, whether it be at Common Law or by Statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species — it must descend to particulars.* 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first to furnish the accused with such a description of the charge against him, as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, *to inform the Court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone.* A crime is made up of acts and intents; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

This language of Mr. Chief Justice Waite very happily illustrates the defect in the second count of the indictment.

"Diamonds," is a generic term by the classification made by the statute itself, and the indictment should have descended to particulars and stated upon its face the species of diamonds upon which duties are levied, to wit: diamonds other than miners', engravers', and glaciers' diamonds. The mere conclusion of law in this count of the indictment, that they were subject to duty, will not help the defective indictment, because the indictment should have stated the facts so that the Court might know, upon reading the indictment, whether they were subject to duty. This takes us to other and further very significant language of Mr. Chief Justice Waite (at page 558), as follows, to wit:

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the Court must be able to decide whether the property taken was such as was the subject of larcency."

So, in this case, the indictment must describe diamonds with that degree of particularity that the Court may decide, upon reading the indictment, whether the diamonds alleged to have been smuggled were subject to duty, because, as we have seen, there are some diamonds which are, and some which are not subject to duty.*

In the case of *State vs. Brown*, 3 Murphy (N. C.), 224, the defendant was charged with being a common Sabbath breaker and profaner of the Lord's Day, in that he sold and exposed to sale divers goods, wares, and spirituous liquors to negroes and others. The indictment did not allege that said negroes and others were not lame or weary travelers. Thereupon the Court arrested the judgment. Judge Henderson, who delivered the opinion of the Court, said (at page 225) as follows, to wit:

"The Court, upon an inspection of the record, must be able to perceive the alleged criminal act; for an indictment, as

* The Court is referred to an additional discussion of this question under division *third*, pages 70–71, this brief, wherein the *Dunbar Case* is distinguished.

was once well observed from this bench by Judge Lowrie, is a compound of law and fact. The latter part of the indictment charges that the defendant kept an open shop and sold divers goods, wares, and spirituous liquors to negroes and others on the Sabbath. This offense, as charged, is not punishable by indictment; *for if the act can be intended to be lawful it shall be so presumed unless it be charged to be done under circumstances whtch render it criminal*, and be so found by a jury. For aught that appears to the contrary, this sale might have been to the lame weary traveler, or to others to whom it was a merit to sell, instead of a crime; and nothing shall be intended against a defendant. And if this were the Sabbath breaking spoken of in the foregoing part of the indictment, taking the whole together, the defendant well might have done all charged against him and yet have committed no crime; and as this may have been the case, we are bound to presume it; at least not to presume to the contrary. The judgment must be arrested."

In *Hirn vs. State*, 1 Ohio St., 15 (1852), the rule is laid down, as follows, to wit:

"A negative averment to the matter of an exception or proviso in a statute is not requisite in an indictment, unless the matter of such exception or proviso enter into and become a part of the description of the offense, or a qualification of the language defining or creating it; but as the exception of the sale of liquor for medicinal and pharmaceutical purposes in the proviso in the first section of the law of 1851, to restrain the sale of liquor, points directly to the character of the offense, and becomes a material qualification in the statutory description of it, an indictment under this section is defective without the negative averment."

The foregoing quotation is from the syllabus, and is of a special force, because under the Rules of the Supreme Court of Ohio, the syllabus is prepared by the Judge, concurred in by his associates, and becomes the law of the case.

Judge Bartley, who delivered the opinion of the Court, stated (at pp. 24–25) as follows, to wit:

"It is requisite that every indictment should contain a substantial description of all the circumstances descriptive of the offense as defined in the statute, so as to bring the defendant precisely within it. And the only substantial reason for requiring this negative averment at all, is that,

without it, the description of the offense would not be complete. When, therefore, the matter of the proviso or exception in the statute, whether it be embraced within what has been termed, the enacting clause or not, *enters into and becomes a part of the description of the offense, or a material qualification of the language which defines or creates the offense*, the negative allegation in the indictment is requisite."

It is clear from the reason of the rule laid down by the authorities that the provisions of paragraph 467 of the free list goes to a description of the articles enumerated under paragraph 338, under jewelry and precious stones, and is a modification thereof.

We are here discussing the sufficiency of the indictment and the Rule of Criminal Pleading that the defendant should be specifically and definitely apprised of the facts with which he is charged as constituting a crime. It is immaterial what evidence may be introduced under a badly drawn indictment, because to allow that kind of pleading would fritter away the guarantee provided for in Article VI of the Amendments to the Constitution of the United States.

III.

Second Count of Indictment — No Proper Conviction Under.

(1.) The omission to get a Consular invoice for diamonds, a failure to put them on a manifest, the placing them in a state-room of a ship at Liverpool, and the arrival of the ship at Philadelphia, the demand for the diamonds at Philadelphia by a Revenue Officer who makes himself known as such, and the getting of the diamonds from the state-room and delivering the same to him does not constitute smuggling.

(2.) There can be no conviction for an attempt to smuggle, on an indictment charging smuggling.

(3.) There is a broad distinction between an intent and an attempt; there is a wider distinction between acts which constitute a preparation, and the after over-acts of an attempt.

(3a.) Obtaining diamonds in Europe, with the intention of smuggling into America, omitting to get a Consular invoice, placing them in a state-room on a ship at Liverpool, omitting them from a ship's manifest, steering the ship into the port at Philadelphia, accompanied by an intention to smuggle, when nothing more is done, while they may constitute the distinctive offenses of omitting from the manifest, or importing contrary to law, do not amount to more than over-acts of preparation, and there is no over-act of an attempt to smuggle.

(3b.) When such diamonds remain in the state-room of the steamer, where they had been placed at Liverpool, and a Revenue Officer boards the ship at Phila-

delphia, and making himself known as such and demands the diamonds, and the Captain goes to the state-room, gets the diamonds and delivers them up to the officer, there is no overt act of an attempt to smuggle.

The second count of the indictment charged Mr. Herman Keck, plaintiff in error, with having smuggled and clandestinely introduced 563 diamonds without paying the duty thereon. This charge is based upon the following language of Section 2865 of the Revised Statutes of the United States, as amended February 27, 1877, Chapter 69, 19 U. S. Statutes at Large, 247, to wit:

"If any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce into the United States any goods, wares, or merchandise, subject to duty by law, which should have been invoiced, without paying or accounting for the duty, * * * * shall be deemed guilty of a misdemeanor."

The only witness on behalf of the United States was Captain Frank Loesewitz. As appears from the Bill of Exceptions, the story as told by him is substantially as follows: That he was a native citizen and resident of Antwerp, Belgium; by occupation, a seafaring man and Captain of the steamer Rhynland, plying between Philadelphia and Liverpool. On the 27th day of January, 1896, witness made a social call at the residence and place of business of Mr. Van Hammelrick, in Antwerp, Belgium, Van Hammelrick being a friend of twenty-five years' standing, and the owner of a jewelry store. Just as witness was leaving, Mr. Van Hammelrick come with a person whom the witness identified in Court as Mr. Herman Keck, the plaintiff in error, and Mr. Van Hammelrick invited witness to go and have a glass of beer. The strange person was introduced, but his name was not given. The three went to the Cafe Alsacienne, on the Place Verte, sat down at a table, and each ordered a glass of beer. The place was crowded, and there were thirty or forty people about. Mr. Van Hammelrick spoke in Flemish. While they were sitting there Mr. Van Hammelrick took a small package

from his pocket, showed it to witness, and said, "This package belongs to that person here," and Van Hammelrick further said to witness, "Will you oblige me to take that over to America? It belongs to him; it belongs to that gentleman: he's a customer of mine; it does not contain any valuables." Witness asked the stranger, "Where shall I send it to?" The stranger tore a piece of paper off a card lying on the table and put an address on it. The name on it was T. Van Reeth, Fourth Street, Cincinnati — either No. 21 or 24, and witness thought 21. Witness put the package and paper in his pocket, and after being at the cafe a quarter of an hour, the three separated on Place Verte, where Mr. Keck told witness to send the package by Adams Express. Witness sailed from Liverpool on January 29, 1895, and put the package in his state room and the paper in a card case in his pocket. When the Rhynland reached the port of Philadelphia the following took place, as testified to by the witness Captain Frank Loesewitz (original record, p. 66; printed, p. 27), to wit:

"Two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, yes. I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were Treasury agents, and said, 'Captain, that is a package of diamonds you have got to be sent to Cincinnati, and if I did not deliver it I would be arrested.' After a while I went down in my room and brought the package up and delivered it over to the Treasury agents. That is all that happened."

The witness further testified (original record, pp. 81–82; printed, pp. 36–37) that he had been in the habit of bringing over small packages in the same way he had brought this package, and that after the vessel had been docked he would go to a custom officer on the dock and report the fact. In this case he had not had time to go on the dock, as the Treas-

ury agents came aboard before he had time to go upon the dock.

The testimony of Mr. Herman Keck, plaintiff in error, was a direct and categorical denial of the statements made by Captain Frank Loesewitz, as to all matters directly affecting Mr. Keck.

The Court in its charge said to the jury (original record, p. 208; printed, p. 112):

"*Gentlemen of the jury:* The several statutory provisions under which the defendant is indicted have been read to you and are doubtless understood. I need not undertake to explain them, or to dwell upon the law governing the case. It is sufficient to say in this respect, that if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To the following part of the foregoing language, to wit:

"It is sufficient to say in this respect, that if the statements made here under oath, by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged,"

Mr. Herman Keck, plaintiff in error, the jury being then and there at the bar of the Court, then and there excepted, which exception was then and there duly allowed by the Court (original record, pp. 209–210; printed, p. 113), and the same appears as assignment number seventeen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for writ of error (original record, pp. 226–227; printed, p. 120).

Mr. Herman Keck requested the Court to give a binding instruction to find the defendant not guilty (original record, p. 204; printed, p. 110). This was refused by the Court, and an exception taken (original record, p. 208; printed, p. 112), and was assigned number ten in the assignment of errors (original record, pp. 216–217; printed, p. 116). The fourth

request was for a binding instruction to return a verdict of not guilty upon this count of the indictment (original record, p. 205; printed, p. 110). The Court disallowed the same and an exception was taken (original record, p. 208; printed, p. 112), and is assigned as number twelve in the assignment of errors (original record, pp. 217–218, printed, p. 116), and in the petition for a writ of error (original record, p. 226; printed, p. 119). Assignment number thirteen in the assignment of errors (original record, pp. 218–219; printed, p. 116) will be more specifically noticed hereafter. Assignment number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117), refers to the answer of the Court to the request for special instruction number 10. The Court said (original record, p. 207; printed, p. 112) to wit:

"The Court affirms the tenth point generally, but the meaning ascribed to it by the Court is, that the jury shall be fully convinced, from a careful examination of all the testimony heard, that the defendant is guilty of the smuggling charged *as testified to by Captain Loesewitz*, and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilt generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal and should be acquitted."

An exception was taken to this answer of the Court (original record, p. 208; printed, p. 112), and the ruling of the Court was assigned as number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117).

The rulings of the Court just detailed are erroneous for three reasons: 1. The facts do not constitute smuggling; 2. An attempt to smuggle is not alleged; 3. If an attempt to smuggle has been properly alleged, the facts do not make out a case of an attempt.

First. The facts do not constitute smuggling. The regular course pursued in shipping merchandise to America is as follows: The invoice is produced to the American Consul at the place where the merchandise is purchased, and the same is

duly certified to by the Consul. Act of June 10, 1890, 26 U. S. Statutes at Large, Chapter 407, page 131. An omission to get a consular invoice is not smuggling or an attempt to smuggle. The next step is to put the goods on board the ship. That does not constitute smuggling or an attempt to smuggle. The next step is for the Captain of the vessel to put the goods on his manifest. Revised Statutes United States, Section 2806. An omission so to do is not smuggling or an attempt to smuggle, but is a distinct offense of omitting goods from the manifest. Revised Statutes of the United States, Section 2809. The next step is to steam or sail the vessel from the port of departure to the port of entry. That is not smuggling or an attempt to smuggle. After the ship arrives the manifest must be produced. Revised Statutes United States, Sections 2811 and 2812. An omission to produce the manifest is not smuggling or an attempt to smuggle, but a distinct offense under Revised Statutes of the United States, Section 2814.

If goods be upon board the ship and without a consular invoice, and without appearing upon the manifest, it may be so from one of two reasons: 1. Because there is no intention to take them ashore at that port; or, 2. From a yet unexecuted intention of smuggling them ashore from the ship or clandestinely taking them ashore from the ship at the port of arrival. If a person has an intention to smuggle and the ship arrives at the port of entry with the goods on board, there may never be a crime of smuggling or attempting to smuggle. There may be either a sudden destruction of ship and cargo by storm, or an abandonment of the intention, before attempting to carry it into effect, or by a seizure of the goods before an attempt is made to carry the intention into effect. The principle governing each of these classes is the same, all being cases of unexecuted intention, or intention without the overt act, arising, in one case, from the act of God, in the

other from the act of repentance before attempting the wrong, and the last by the act of the Government.

The following is laid down in 1 Russell on Crimes (9th Edition), 172, to wit:

"Among the offenses against the revenue laws, that of smuggling is one of the principal. It consists in bringing on shore, or carrying from the shore goods, wares, or merchandise, for which the duty has not been paid, or goods of which the importation or exportation is prohibited. An offense productive of various mischiefs to society."

In the case on trial, Captain Loesewitz testified that he put the diamonds in his state-room at Liverpool, where they remained until Mr. Gallen, a revenue officer, came aboard the ship at Philadelphia, made himself known to be a revenue officer, and demanded the diamonds, and they were thereupon delivered to Mr. Gallen (original record, p. 66; printed, p. 27). It therefore follows that the diamonds were never smuggled. Such being the case, it was clearly erroneous for the Court to charge the jury that if they believed the story of Captain Loesewitz they must find the defendant guilty; to refuse the request to find the defendant not guilty; to refuse the request to find the defendant not guilty on the second count in the indictment; to say to the jury in response to a request for a special instruction, that they should return a verdict of guilty, generally, if they were convinced that the defendant was guilty of smuggling as charged, as testified to by Captain Loesewitz.

Second. An attempt at smuggling is not alleged. If there be a statute which will punish an attempt to smuggle, an attempt has not been alleged. State vs. Colvin, 90 N. C., 717 (1884). It is repugnant to charge one with doing an act, and at the same time to say that he attempted to do it. For some offenses attempts are made substantive offenses, such as attempts to commit the crime of murder or manslaughter under Section 5342 of the Revised Statutes

of the United States. In some States statutes have been passed permitting a conviction for an attempt under an indictment for doing the act. But there are no Federal Statutes of that kind, and none in reference to the crime of smuggling.

Third. If an attempt at smuggling has been properly alleged, the facts do not make out a case of an attempt. If, for the sake of argument, we take the strongest possible view of the testimony of Captain Frank Loesewitz, there was an unexecuted intention to make an attempt to smuggle; or, at most, a preparation accompanied with an intention to make an attempt to smuggle. The acts of preparation were, first an omission of a Consular invoice which would be one step; putting the diamonds on ship-board in the state-room at Liverpool, which would be the second step; omitting the diamonds from the manifest, which would be the third step; steaming the vessel from the port of Liverpool to the port of Philadelphia, which would be the fourth step in the preparation; omitting to deliver a manifest containing the diamonds, which would be a fifth step in the preparation. But here the overt acts cease, and all of the overt acts were but preparatory. Nothing further was done, and the goods remained in the state-room on ship-board, where they were first placed in Liverpool, until Mr. Gallen, a revenue officer, who made himself known as such, demanded the goods in his official capacity, and they were delivered up to him in that capacity. Merely because there was the crime of failing to get a Consular invoice, or the offense of omitting goods from the manifest, or the offense of failing to deliver a manifest with the goods thereon, and because said acts constituted an unlawful importation under the provisions of Section 3082 of the Revised Statutes of the United States, and merely because in this case there could be no conviction of importing contrary to law, because the first count of the indictment was badly drawn, would not authorize a conviction

for an attempt to smuggle, when, by the over-zeal of the Treasury official, no overt act toward landing the diamonds was done.

There is a wide distinction between an attempt and an intent. There is a wider distinction between acts constituting an attempt and acts constituting preparation. The antimoiety act of June 22, 1874, 18 U. S. Statutes at Large, Chapter 391, page 186, defines smuggling for the purposes of that act in the following language, to wit:

"That for the purposes of this act smuggling shall be construed to mean *the act* with intent to defraud of bringing into the United States, or with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the packages containing the same, throught he custom-house, or submitting them to the officers of the revenue, for examination."

Even if we adopt this as a legislative definition of smuggling and of an attempt to smuggle, the evidence fails to make out a case. It appears that Judge Benedict, in the case of the *United States vs. Claflin*, 13 Blatchford, 178 (1875), adopted it on a definition. We have already shown (this brief, pp.39-40) that at most there was a me repreparation to make an attempt to smuggle without any attempt; an unexecuted intention, and no overt act done beyond the acts of preparation. An attempt is an interrupted act done after the acts of preparation.

The Court's special attention was called to this matter by request number five (originial record, p. 205; printed, pp. 110-111) in the following language, to-wit:

"No. 5. The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not

invoicing the same, or putting the same on his manifest and delivering same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen, said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling, or clandestinely introducing, or attempting to bring in, and as to the crime so charged, your verdict must be not guilty."

The Court refused to give this instruction, to which ruling an exception was taken (original record, p. 208; printed, p. 112) and the same was assigned as number thirteen in the assignment of errors (original record, pp. 218–219; printed, p. 116), and is set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

The Court should have given this special instruction, and also granted the request for a binding instruction to find the defendant not guilty; and it was clearly error for the Court to charge the jury, that if they believed the statements made by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing to America, that the jury should find the defendant guilty.

There was no interrupted overt act of bringing in of the diamonds from the state-room of the steamer Rhynland, where they had been lying since put there at Liverpool; no interrupted overt act of an introduction of the diamonds from the state-room of the steamer Rhynland, where they had been lying since put there at Liverpool; no moving of the diamonds from said state-room toward the shore, interrupted before reaching the shore. All preparations had been completed, either to bring them in lawfully by passing them through the custom house, or submitting them to the officers of the revenue for examination, on the one hand; or, of attempting to pass them from the state-room to the shore without passing them through the custom house, or submit-

ting them to the officers of the revenue for examination, on the other hand. Anti-moiety act of June 22, 1874, 18 U. S. Statutes at Large, Chapter 391, page 186, Section 4, paragraph 2. No overt act had yet been done, no matter how many acts of preparation or what the secret intention.

If, after the steamer Rhynland arrived, a stroke of lightning had sunk the ship, it is clear that up to that time there was no smuggling or an attempt to smuggle, although an offense of omitting to have a Consular invoice, or omitting to put the goods on the manifest, may have been committed (this brief, pp 39–40).

If, after the ship arrived, Captain Loesewitz had changed his mind and concluded either to pass the same through the custom-house, or submit them to the officers of the revenue, or returned them to Europe, it can hardly be claimed that there was smuggling, or an attempt to smuggle. Or if, after the ship had arrived, an officer of the Government should have demanded an examination, and Captain Loesewitz, knowing the officer to be such, should thereupon submit them to the officer in his official capacity, it is clear that there had been no smuggling, and as yet no overt act of an attempt to smuggle. Or, as in this case, the diamonds were lying in the cabin just as they had been put at the port of Liverpool, and no move made toward taking them from the state-room ashore, there could not be smuggling or an attempt to smuggle, as there was no overt act toward bringing in or introducing, interrupted while being carried out. On the contrary, upon a revenue officer demanding the diamonds, in his official capacity, the Captain went to the state-room, got the diamonds, and they were submitted to the revenue officer for his examination (original record, p. 66; printed, p. 27). What was done comes within the very language of paragraph 2, section 4, of the Anti-moiety Act of June 22, 1874, 18 U. S. Statutes at Large, Chapter 391, page 186, as to acts which do not constitute smuggling or attempting to smuggle. By the

language of the Anti-moiety act, *nonaction* is not an offense, but *an act*. Nor is it to be forgotten that Captain Frank Loesewitz testified (original record, pp. 81–82; printed, pp. 36–37), that he had been in the habit of bringing over small packages in the same way he brought the package in the case on trial, and after the vessel had been docked he would go to a custom officer on the dock and report the fact, but that in this case he had no time to go on the dock, as the Treasury Agents came aboard before he had an opportunity to go upon the dock.

These principles have been announced and applied in numerous cases. In the case of *People vs. Murray*, 14 Cal. 159, Chief Justice Field (at p. 159) laid down the following proposition:

"Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made."

So in the case on trial it is clear that all the means and measures for the commission of the offense were completed, and preparations made, but there was no direct movement toward the commission after the preparations were complete.

The case of *Mulligan vs. People*, 5 Parker's Criminal Reports, 105, decided by the General Term of the Supreme Court of New York in February, 1861 (Clerke, Sutherland, and Allen, Justices), is an interesting one as illustrating the difference between acts of preparation and overt acts of attempt after the acts of preparation. It appears that William Mulligan got into a row in a gambling house. Upon being threatened with eviction, drew and pointed an uncocked Colt's revolver at the officer and threatened to shoot. There was no evidence of an attempt to cock the pistol or to pull the trigger. He was prosecuted under the statute which punished every person who should be convicted of shooting at another, or attempting to discharge any kind of fire-arms,

with intent to kill, maim, etc. (page 109). At the close of the evidence the Court was requested to charge the jury that the pointing of an uncocked Colt's revolver at a person is not an attempt to discharge the weapon. The Court refused the request, and the ruling of the Court was assigned for error. Justice Allen, who delivered the opinion of the Court, said (page 109) that:

"The question presented is, whether a conviction can be had for an attempt to discharge a pistol when the individual indicted has proceeded no further toward an actual discharge of shooting than to raise and point the pistol, uncocked, at the party threatened. There was no evidence of an attempt to cock the pistol or to pull the trigger, and the jury would have been warranted in finding that the prisoner merely raised the pistol and pointed it at the officer, making the qualified threat before stated. The instruction was properly asked for upon the evidence. *The threat constituted no part of the attempt to discharge the pistol, and was only evidence of the intention of the prisoner.*"

The Court further stated (page 111):

"It is not an attempt to discharge a loaded gun or pistol to put oneself in a situation in connection with the gun or pistol that it may be discharged. A mere getting it in readiness to discharge is not an attempt to discharge it. Upon the trial, an assault with intent to kill was confounded with the specific, statutory, and entirely different offense charged, an attempt to discharge a loaded pistol with the like intent. The act, the attempt to commit which was made an offense, was the discharge of fire-arms. No matter what other offense was committed against the laws, or the person of the officer, if this offense was not committed, the prisoner was wrongfully convicted. It is far from certain that any offense was committed by the prisoner, but of that we are not the judges. We are only to decide upon the present conviction."

The Court again said (at p. 112):

"An attempt is an endeavor to do an act carried beyond mere preparation, but falling short of execution of the ultimate design (Bouvier's Law Dic.). Loading a pistol would be a preparation to shoot, but not an attempt to discharge. So, to get possession of a pistol, to take it from the pocket, and to point it would be a preparation to discharge it, but not an attempt to discharge it. It may not always be easy to deter-

mine where the line is which separates a preparatiou to perform a given act from an attempt to perform the act. But the act, which is characterized as an attempt, must be proximate to the principal thing to be accomplished, a means to the end, and the pointing of a pistol uncocked is not an attempt t. discharge it, punishable under the statute. Fire-arms are usually discharged by drawing a trigger, but they may be discharged in any way by which the powder can be ignited and made to explode, and the attempts to discharge may be as diversified as the means of discharge are various, but can only be by some act, which, carried out and perfected, will result in a discharge."

In the case at bar the question is whether Mr. Herman Keck, plaintiff in error, has done an overt act by attempting to smuggle in violation of Section 2865 of the Revised Statutes of the United States, and not whether he did or attempted to violate any other provision of law. Chief Justice Field (at p. 159), in *People vs. Murray*, 14 Cal., 159 (1859).

In *Kelly vs. Commonwealth*, 1 Grant Cases (S. C. Pa.) 484, the defendant was indicted for killing in an attempt to commit rape. The evidence disclosed the killing of a man, and no overt act of force toward the commission of a criminal assault upon his daughter. The Court held that the facts did not make a case for an attempt to commit rape, reversed the conviction because "acts are necessary to constitute an attempt; and an attempt to commit a rape is an ineffectual offer by force to have carnal connection."

It is laid down in *State vs. Wilson*, 30 Conn. 500 (1862), that the overt act charged as constituting the attempt must be such as is in itself adapted to produce the effect intended. In the case at bar such overt act would have consisted in after having gone to the state-room on the steamer Rhynland, where the diamonds had been lying ever since put there at Liverpool, moving them with the intention of not passing them through the custom-house or submitting them to the revenue officers for examination, would have constituted an overt act of attempt. But no such overt act was done or attempted to be done, and therefore there was no attempt.

IV.

Evidence Erroneously Admitted.

(1.) A person sworn as a witness should be permitted to state only facts to which he was a percipient witness. If a person claiming to be a percipient witness to facts, declare same to another, the latter, when sworn as a witness, is but a percipient witness to the fact of the declaration, and not to the transaction declared to him. And said declaration is purely hearsay and inadmissible. An exception to this rule arises in cases of declarations made by a conspirator during the continuation of the conspiracy; but declarations made thereafter are hearsay and inadmissible.

(1a.) When a sea captain claims that a stranger to him in Europe induced him to smuggle diamonds into America, and said sea captain steamed his vessel into the port of Philadelphia, where the diamonds were seized and the captain arrested by a revenue officer, and a day after the seizure the captain gave to the revenue officer a description of the stranger, who, he claims, gave him the diamonds in Europe, but whose name he did not know, it is not competent upon the trial of said stranger on a charge of smuggling for said revenue officer to give testimony as to the description given to him a day after the seizure of the diamonds and the arrest of the captain. Such testimony is incompetent, is hearsay, and does not come within the rule of declarations made by a conspirator during the continuation of the conspiracy.

(2.) Hearsay evidence is not competent to corroborate the statements of a witness made upon the stand.

(2a.) A court admitted hearsay evidence. It was all that could be claimed to be corroborative of the evidence of the person claiming to be the only percipient witness to a transaction. The Court charged the jury that if they believed the statements under oath of said percipient witness, they must find the defendant guilty, and said part of the charge was duly excepted to. When the Court further charged the jury that the Government claimed that the percipient witness was corroborated in such manner that it was not only safe to believe, but that belief could not be avoided, and that the points of corroboration had been dwelt upon by the District Attorney very fully, and the Court need not further allude to them, such part of the charge is such a plain error, vital to the defendant, that a reviewing court should correct, although not excepted to, or assigned for error.

The Court overruled an objection of Mr. Herman Keck, plaintiff in error, to a question put by the District Attorney to the witness, John C. Gallen (original record, pp. 97–98; printed, p. 46). The error arose as follows:

The United States, to maintain the issues on its part, called, among other witnesses, Captain Frank Loesewitz. (Original record, p. 59; printed, p. 22.)

As appears from the Bill of Exceptions, the story as told by him is substantially as follows: That he was a native, citizen, and resident of Antwerp, Belgium; by occupation a seafaring man and captain of the steamer Rhyland, plying between Philadelphia and Liverpool. On the 27th day of January, 1896, witness made a social call at the residence and place of busi-

ness of Mr. Van Hammelrick, in Antwerp, Belgium; Van Hammelrick being a friend of twenty-five years' standing, and the owner of a jewelry store. Just as witness was leaving, Mr. Hammelrick came in with a person whom the witness indentified in court as Mr. Herman Keck, the plaintiff in error, and Mr. Van Hammelrick invited witness to go and have a glass of beer. The strange person was introduced, but his name was not given. The three went to the Café Alsacienne, on the Place Verte, sat down at a table, and each ordered a glass of beer. The place was crowded, and there were thirty or forty people about. Mr. Van Hammelrick spoke in Flemish (original record, p. 61; printed, p. 24). While they were sitting there Mr. Van Hammelrick took a small package from his pocket, showed it to witness, and said, "This package belongs to that person here," and Van Hammelrick further said to witness, "Will you oblige me to take that over to America? It belongs to him; it belongs to that gentleman; he's a customer of mine; it does not contain any valuables." Witness asked the stranger, "Where shall I send it to?" The stranger tore a piece of paper off a card lying on the table and put an address on it. The name on it was T. Van Reeth, Fourth Street, Cincinnati—either No. 21 or 24, and witness thought 21. Witness put the package and paper in his pocket, and after being at the café a quarter of an hour, the three separated on Place Verte, where Mr. Keck told witness to send the package by Adams Express. Witness sailed from Liverpool on January 29, and put the package in his state-room and the paper in a card case in his pocket. When the Rhynland reached the port of Philadelphia the following took place, as testified to by the witness Captain Frank Loesewitz (original record, p. 66; printed, p. 27).

"Two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, 'yes.' I thought

those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were Treasury agents, and said, 'Captain, that is a package of diamonds you have got, to be sent to Cincinnati,' and if I didn't deliver it I would be arrested. After a while I went down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened."

The witness further testified (original record, pp. 81–82; printed, pp. 36–37) that he had been in the habit of bringing over small packages in the same way he brought this package, and that after the vessel had been docked, he would go to a custom officer on the dock and report the fact. In this case he had not had time to go on the dock, as the Treasury agents came aboard before he had time to go upon the dock.

The witness further testified (original record, p. 82; printed, p. 37) that he had never heard of Mr. Keck, did not recall his name, and the first time he knew his name was when Mr. Gallen, the Treasury officer, came on board of the ship. The witness testified that he had no recollection of the name "Keck," and if Mr. Gallen had said "Johnson," witness would not have known the difference (original record, p. 83; printed, p. 37), and all witness knew was the man's face, and that he could not identify him by his name at all, but by his face.

The following illustrates a part of this testimony (original record, p. 83; printed, p. 37):

Q. "You did not identify him by his name at all, did you?"

A. "No, not by his name. I identified him by his face."

Herman Keck, plaintiff in error, did not sail on the "Rhynland," was never on the "Rhynland," and was not at Philadelphia. Herman Keck, the plaintiff in error, arrived in New York from Europe on the steamer "Aller," at Hoboken, New Jersey, about the 14th of February, 1896 (original record, p. 98; printed, p. 46).

Herman Keck's testimony is a direct and categorical denial

of the testimony of Captain Frank Loesewitz (original record, pp. 179–197; printed, 95–107).

The United States, to further maintain the issue upon its part, called as a witness Mr. John C. Gallen (original record, p. 92; printed, p. 43).

Among the questions asked by the United States District Attorney and objected to by Herman Keck, plaintiff in error, which objection being overruled by the Court, he then and there excepted (original record, pp. 97–98; printed, p. 46), was the following, to wit:

Q. "Did the Captain give you a description of the man who gave the diamonds to him?"
(Objected to. Objection overruled. Exception allowed for defendant.)
A. "Yes, sir."
Q. "What was the day when he gave you the description?"
A. "The day after I seized the diamonds."

This action of the Court was assigned for error as number five in the assignment of errors (original record, p. 213; printed, p. 114); and has already been set forth in our statement of the case (brief, pp. 7–10).

This ruling raises the question, whether the witness, Mr. John C. Gallen, should have been permitted to detail upon the witness stand delarations made by Captain Frank Loesewitz, one day after the seizure of the diamonds and the arrest of said Captain Loesewitz. It comes within the hearsay rule, and within none of the exceptions thereto. It was proper enough when Captain Loesewitz was upon the witness stand, claiming to be the percipient witness to an alleged transaction in the Cafe Alsacienne, to give a description of the person with whom he claimed to have had the transaction. It would have been competent for a person knowing Mr. Herman Keck, plaintiff in error, to state from the witness stand Mr. Keck's appearance, as a percipient witness thereto. In the instance first mentioned Mr. Gallen's testimony would be

but a repetition of what Captain Loesewitz said to the witness, and the witness Gallen was a mere percipient witness to the conversation, and not to a description of Mr. Keck. The statement by Captain Loesewitz of such description to witness Gallen, and detailed by Mr. Gallen on the witness stand, would be hearsay evidence. Best's Principles of Evidence (Chamberlayne's Ed., 1883), Section 492, Note (1). Such hearsay was inadmissible, and there is no rule or principle of the law admitting it. Mr. Herman Keck, plaintiff in error, positively denied meeting Captain Frank Loesewitz. It would be a strange rule to allow Captain Loesewitz, after testifying upon the witness stand to a description of Mr. Herman Keck, to claim to corroborate that statement as truth by showing by the witness Gallen that he had told the same story to others; especially as the story told by Captain Loesewitz, both on and off the stand, was claimed by Mr. Herman Keck to be a falsehood. If that testimony be admissible, it would have been competent for Mr. Herman Keck, plaintiff in error, to have called a hundred persons to testify that he had stated to them that he did not know Captain Loesewitz, for the purpose of corroborating his testimony upon the witness stand, that he had not met Captain Loesewitz. Nor is the objection removed by the fact that the learned District Attorney put a leading question. This evidence is especially prejudicial, as Captain Loesewitz testified that he did not know Mr. Keck by name; had no recollection of the name "Keck," and if Revenue Officer Gallen had said "Johnson," the witness would not have known the difference; that all the witness knew was the man's face, and that he could not identify him by his name (original record, p. 83; printed, p. 37). A name being but one means of identification, it would have been clearly incompetent to have some one detail from the witness stand a conversation had with Captain Loesewitz one day after the seizure of the diamonds, wherein Captain Loesewitz described Mr. Keck by name; it was equally incompetent if described him in some other way.

A well-recognized exception to the rule against hearsay is, that *while a conspiracy exists*, the declaration of one co-conspirator in furtherance of the common design are admissible against his associates. 2 Wharton Evidence (3d Ed., Sec. 1205). But a narrative after the conspiracy is terminated, is inadmissible. 2 Warton Evidence (3d Ed., Sec. 1206). If there were a conspiracy between Captain Frank Loesewitz and Mr. Herman Keck, that conspiracy had been terminated by the seizure of the diamonds by Revenue Agent Gallen. A full day elapsed after the seizure. Before the declaration offered in evidence was made.

The rule governing the reversal of cases for the wrongful admission of evidence is admirably stated in the case of *Boston and Albany Railroad Company vs. O'Reilly*, 158 U. S., 334 (1894), by Mr. Justice Shiras (at p. 337), as follows:

"If the record disclosed no other error, the admission of this evidence might have been passed by as immaterial. Still, it is impossible to say that the defendant's case was not injuriously affected by the admission of the evidence, and, while an Appellate Court will not disturb a judgment for an immaterial error, *yet it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting. Deery vs. Gray*, 5 Wall, 795, 807; *Gilmer vs. Higley*, 110 U. S., 47."

This error was especially material and prejudicial, because there was oath against oath, and anything, no matter how slight, may have wrongly turned the scales against the defendant.

The Court, having once made its ruling that testimony of this character was competent, it was hardly the province of, or becoming to, an advocate, to keep on objecting every time the District Attorney offered similarly incompetent testimony. An advocate has a duty to perform, and nothing so seriously prejudices a case before a jury as constant unavailing objections and noting exceptions. An objection was made by Mr. Herman Keck, plaintiff in error, the objection

overruled, and an exception taken. The Court having opened up this sluice-way, the learned District Attorney poured in upon the case great volumes of similarly incompetent testimony. This evidence is clearly prejudicial, and it does not appear beyond a doubt that it was not and could not have been prejudicial to Mr. Herman Keck, plaintiff in error.

This very incompetent and illegal testimony was the chief reliance of the District Attorney in his argument for corroboration; and it pierced the defendant like a dagger when, after allowing this kind of hearsay evidence to be admitted, and the District Attorney had claimed in his argument that it corroborated the witness Frank Loesewitz, to charge the jury (original record, p. 209; printed, p. 112), as follows:

"The Government claims, however, that the Captain is corroborated in important particulars, and in such manner that it is not only safe to believe him, but that belief can not be avoided. The points of corroboration and the matters on which they depend have been referred to and dwelt upon by the District Attorney very fully, and I need not further allude to them."

And for the Court to make this incompetent and illegal hearsay doubly prejudicial it had but to add (original record, p. 208; printed, p. 112) that:

"It is sufficient to say in this respect that if the statements made here, under oath, by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here, are true, the defendant is guilty of the offense charged."

If it be said that the part of the charge first here quoted was not excepted to and assigned for error, yet it is that kind of a plain error, vital to the defendant, which this Court always corrects. *Wiborg vs. United States*, 163 U. S., 632, 633 (1896).

That part of the charge, secondly quoted, was duly excepted to (original record, pp. 209–210; printed, p. 113) and assigned for error as number seventeen in the assignment of errors

(original record, p. 222; printed, p. 118). The Court reiterated this error in its answer to request number ten for a special instruction (original record, p. 207; printed, p. 112), which answer was duly excepted to (original record, p. 208; printed, p. 112) and assigned for error as number sixteen in the assignment of errors (original record, p. 221; printed, pp. 117–118).

V.

Evidence Erroneously Excluded.

(1.) In every case the following are pertinent hypothesis: (a) the issue made by the pleadings; (b) the truthfulness of a witness; (c) the accuracy of a witness; (d) the bias of a witness; (e) the probability or improbability of the evidence of the witness. It is competent to introduce evidence to prove or disprove any or all of said hypotheses, and such evidence is relevant and admissible, and its weight for the jury.

(1a.) A sea captain testified that while in Europe a stranger procured him to agree to smuggle diamonds into America; that he saw the stranger but fifteen or thirty minutes; that the conversation was carried on in Flemish by a friend of the Captain; that the stranger wrote an address on a piece of paper, and the only thing he said was, "by Adams Express," which was in English; that he did not know the stranger by name, and could only identify him by his face; and that he expected to better his condition by testifying. Said stranger, when on trial charged with said smuggling, denied meeting the Captain, the alleged transaction, and having any conversation with him. Under said circumstances it is competent for said defendant to offer evidence to show that he dealt wholly in rough diamonds, could not make use of the cut diamonds in his business, he never handled diamonds of the character alleged to have been smuggled, and had no motive to smuggle. Such evidence is competent in support of the hypothesis that the Captain was mistaken in his identity, biased in his evidence, and that the evidence of the Captain was improbable and that of the defendant probable. It being thus relevant to pertinent hypotheses, the Court must admit it; its weight is for the jury.

(1b.) On the trial of the said defendant, the said Captain, a resident of Antwerp, testified that when, on January 27, 1896, the diamonds were handed to him by his friend, the stranger (Mr. Keck) wrote on a piece of paper the name T. Van Reeth, 21 West Fourth St., Cincinnati, and handed it to him; that he kept said paper in his pocket, and produced it for the first time March 18, 1896; the Captain steamed his vessel into the port of Philadelphia, February 11, 1896, was arrested and the diamonds seized. On his arrest, and thereafter, he claimed, to have given a full statement of the receipt of the diamonds and the circumstances surrounding same. After his arrest he made a trip to Europe and returned to testify against Mr. Herman Keck, March 18, 1896, when, for the first time, the Captain produced the paper and claimed that it had existed since January 27, 1896. He denied that he knew Franz Van Reeth, but admitted that he might have seen the name and picture of Franz Van Reeth in the Antwerp newspapers, with the statement that Franz Van Reeth had gone to Cincinnati to cut diamonds. Franz Van Reeth, a diamond cutter and former resident of Antwerp, testified that he had known the Captain for twelve years. Mr. Constant Van Reeth, of Antwerp, a son of Franz Van Reeth, was called as a witness. It was offered to prove by him that the newspaper which the Captain stated he read, did contain the name and picture of his father, Franz Van Reeth, together with a statement that his father had gone to Cincinnati to cut diamonds. Such testimony was relevant to the pertinent hypotheses that the witness, Captain

Frank Loesewitz, was untruthful, biased in not admitting the whole truth; that the paper was spurious, prepared between the time of his arrest and the time of testifying against Mr. Keck; that the Captain had an opportunity to prepare the same on his revisit to Antwerp between said times; and ought to have been admitted, and it was error for the Court to exclude it.

We have set forth in our statement of the case (brief, pp. 10–12) two instances of the wrongful exclusion of evidence. They will be presented separately:

First. The Court sustained an objection to a question (original record, p. 175; printed, p. 93) put to the witness, Mr. Franz Van Reeth, and the error arose as follows:

There was a direct conflict between the testimony of Captain Frank Loesewitz and Mr. Herman Keck, the plaintiff in error, and when Mr. Franz Van Reeth was upon the witness stand he was asked certain questions, which were ruled out by the Court. Mr. Franz Van Reeth was manager of the Coetermans-Henrichs-Keck Diamond Cutting Company, of which Mr. Herman Keck was President. The following testimony was offered on behalf of Mr. Herman Keck, plaintiff in error, as relevant, as making probable the testimony of Mr. Herman Keck, and improbable the testimony of Captain Frank Loesewitz (original record, p. 175; printed, p. 93), to wit:

Q. "What kind of stones are imported by your firm, cut diamonds or rough?"
A. "Rough."
Q. "What do you do with the rough?"
(Objected to.)
Mr. Shields: "My purpose is to show that they deal wholly in rough diamonds, that they can not make any use of the cut diamonds in their business, and to follow that up by the people who handle their goods and the people who have seen them; that they never have any of this kind of material in their place at all, so as to show there was no motive on the part of these gentlemen to smuggle this stuff in."
(Objected to. Objection sustained. Exception allowed for defendant.)

This ruling of the Court is assigned for error as number nine in the assignment of errors (original record, pp. 215–216;

printed, pp. 115–116), and is set forth in the petition for writ of error (original record, pp. 225–226; printed, p. 119). It has already been set forth in our statement of the case (brief, p. 10).

This testimony was clearly competent as rendering probable the testimony of Mr. Herman Keck, and improbable the transaction claimed by Captain Frank Loesewitz to have taken place.

The rules of relevancy and their application are plainly shown by the text writers, and in many adjudged cases.

In Thayer's Cases on Evidence, 2, the rule is thus laid down:

"Observe at this point one or two fundamental conceptions. There is one precept to be mentioned, which is not so much a rule of evidence as a pre-supposition involved in the very conception of a rational system of evidence as contrasted with the old formal and mechanical system: viz., nothing, which is not supposed to be relevant, *i. e.*, logically probative, shall be received. How are we to know what these things are? Not by any rule of the law. The law furnishes no test of relevancy. For this, it tacitly refers to logic, assuming that the principles of reasoning are known to its judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known.

"And there is another precept which it is convenient to lay down as a preliminary one in stating the law of evidence, viz., that unless excluded by some rule or principle of law, all that is logically probative is admissible. This general admissibility of what is largely probative is not, like the former precept, a necessary presupposition in a rational system of evidence; and, accordingly, there are very many exceptions to it. But yet, in order to a clear conception of the law, it is important to notice this also as being a fundamental proposition."

And again (p. 3):

"The law of evidence is the creature of experience, rather than logic, and we can not escape the necessity of tracing that experience. Founded, as being a rational system, upon the laws that govern human thought, and so presupposing and conforming to them, it yet recognizes another influence that must, at every moment, be taken into account; for it is

this which has brought it into being, as it is the absence of this which alone accounts for the non-existence of these rules in all other countries, ancient or modern. For, as I have already indicated, the main errand of the law of evidence is to determine, not so much what is admissible in proof, as what is inadmissible. Assuming, as it does, that, in general, what is evidential is receivable, it is occupied in pointing out what part of this mass of matter is excluded. It denies to this excluded part, not the name of evidence, but the name of inadmissible evidence. Admissibility is determined, first, by relevancy—an affair of logic and not of law; second, but only indirectly, by the law of evidence which, in strictness, only declares whether matter, which is logically probative, is excluded."

The same principle was announced in a controversy involving identity by Judge Minshall in the case of *Bell vs. Brewster*, 44 Ohio St., 690 (1887), in somewhat different language, when he said (at p. 699) that:

"Judicial proof is not a matter of mere arbitrary rule. Its principles are drawn from the experience and observation of men, and should be applied as they are by men in general. Every lawyer and judge of experience will confirm what is said by Mr. Phillips in his work on evidence: 'It may be laid down as a first principle that exclusion is generally an evil and admission generally safe and wise.' To which he adds: 'It is certain the administration of justice in our courts has suffered, not from too free admission of evidence, but from too rigid exclusion.' 2 Phil. Ev. (Edwards Ed.) 628."

In 1 Wharton on Evidence (3d Ed.), Sec. 20, the rule is thus admirably stated:

"Relevancy is that which conduces to the proof of a pertinent hypothesis: a pertinent hypothesis, being one which, if sustained, would logically influence the issue. A will, for instance, is contested, and several hypotheses are presented, on any one of which, if proved, the instrument would be invalid. The signature, for instance, may have been forged, or the testator insane, or he may have been fraudulently induced to execute a paper different from that which he had in view. To each of these hypotheses, a series of counter hypotheses is conceivable. If the hypothesis set up for the defense is forgery, then all facts which are conditions of forgery are relevant. A party, for instance, sued on a bill sets up forgery;

to meet this hypothesis, it is admissible for plaintiff to prove that the defendant, at the time of the making of the bill, was trying to borrow money. If the hypothesis set up for the defense is fraud, then all facts which are conditions of fraud are relevant. Or, to take another illustration: A prairie is fired, it is said, by a passing locomotive; the hypothesis of the plaintiff is that the firing was by negligence, and for the plaintiff all the conditions of negligence are relevant. The defense sets up *casus*, or contributory negligence; and then, on the part of the defense, it is relevant to prove the conditions of either of the latter hypotheses."

And again (at Section 21):

"Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable."

The learned writer illustrates his main proposition (in Section 23) as to pertinent hypothesis as to proof of the author of Junius; and (in Section 24) as to identify in the famous Tichborne case.

Sir James Fitzjames Stephen, in his Digest of the Law of Evidence, Part 1, Chapter 2, Article 7, lays down the following rule:

"When there is a question whether any act was done by any person, the following facts are deemed to be revelant, that is to say:
"Any fact which supplies *a motive* for such an act, or which constitutes preparation for it."

He illustrates this rule as follows:

"The question is, whether A. murdered B. The facts that, at the instigation of A., B. murdered C. twenty five years before B.'s murder and that A. at or before that time used expressions showing malice against C. are deemed to be relevant as showing *a motive* on A.'s part to murder B."

The author quotes *R. vs. Clewes*, 4 C. & P., 221. The American editor (Mr. William Reynolds) cites *McKee vs. People*, 36 N. Y., 113; *Kolb vs. Whiteley*, 3 G. & J., 188, 195; *Garber vs. State*, 4 Caldw. (Tenn.), 161, 165.

In Wharton on Criminal Evidence (9th Ed.), Section 17, the rule is thus stated:

"Suppose the question to be, *whether it is more probable* that a given abstract man (the witness) should have committed one crime, that of perjury, than that another given abstract man (the defendant) should have committed another crime, that of murder; here, if we divest the issue of all circumstances on either side, *there is simply a balance of improbabilities* in weighing, which the mind must incline, if it incline at all, to the acquittal of the darker crime."

And again (Section 18):

"Perjury, indeed, is never to be presumed; but we can not shut our eyes to the fact that convictions have sometimes been based upon perjured testimony; and, though the probability of perjury may be but one to a hundred, yet this is only another way of saying that it is probable to a very high degree, but not certain, that there is no perjury in the testimony brought before us in any given case. It is true that *there may be forgery of facts as well as falsification by witnesses;* and it is true, also, that with the exception of such objects as can be brought into court on trial, the adjudicating tribunal must become cognizant of indicatory facts through witnesses who may be as much tempted to perjure themselves in giving this kind of testimony as in giving other kinds of testimony. But it can not be denied that perjury, in respect to that of which a witness says he was the only observer, is more easy than perjury in respect to extrinsic facts open to common observation, and a *forti ori* more easy than the forgery of such facts. Perjury of the first class is skillful in eluding detection; is self-contained and self-verifying; it can be consummated without observation and without machinery; it is thus easily concocted and not easily exposed. On the other hand, extrinsic facts can not be forged with attracting more or less attention, nor testified to without that possibility of exposure inherent in all fabrications of matters extrinsic. False direct testimony, also, hangs ordinarily on a single link, and if that link is sufficiently strong the case succeeds. But is of the essence of what is called circumstantial evidence, *i. e.*, evidence dependent on the collection of numerous self-supporting facts — that if one of these facts should turn out to be forged, the taint affects the whole system. *The probability of detection of falsification is, therefore, in proportion to the number of issues presented.*"

And again (Section 21):

"The evidence on trial consisting, therefore, of a series of facts more or less closely connected, argument consists in the application to these facts of particular hypothesis; and in criminal issues, if there be no probable hypothesis of guilt, consistent, beyond reasonable doubt, with the facts of the case, the defendant must be acquitted. But this is not the only use of hypothesis. *It is only by appealing to hypothesis that questions of relevancy * * * can be determined. * * * Hypothesis, thus, is the basis on which admissibility of evidence must rest, as it is the basis on which must rest either acquittal or conviction.*"

And again (Section 23):

"*Relevancy is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being that which logically affects the issue.* A person is found dead, for instance, with marks of violence on his body, and at once a series of hypotheses are tried in turn, as keys to a lock, to see if they will disclose the secret of the death. Were the wounds homicidal or suicidal? * * * If a person is on trial for the homicide, then against him are admissible all facts that sustain any hypothesis which implies his guilt. When it is his turn to develop his defense, then any facts are admissible that would sustain the hypothesis of his innocence."

And again (Section 24):

"Relevancy is therefore to be determined by free logic, unless otherwise settled by statute or controlling precedent. All facts, that go either to sustain or impeach a hypothesis logically pertinent are admissible. But no fact is relevant which does not make more or less *probable* such a hypothesis."

In *Wiggins vs. People, etc., in Utah*, 93 U. S. (1876), 465, the facts were as follows: Mr. Wiggins was indicted for killing John Kramer (p. 466); Dobson, called by the State, was the only percipient witness (excepting the defendant Wiggins) to the killing (p. 467); Dobson was unable to tell who fired the first shot; Wiggins was convicted. On his trial he offered to prove by witness Haslop (p. 466) that prior to and on the night of the killing, the deceased, John Kramer, made a threat that he would kill the defendant, Wiggins, before he went to bed. Defendant Wiggins could not and did not attempt to show that the threat had been communicated to him. On the

objection of the District Attorney, the Court excluded this evidence, and an exception was taken. Mr. Wiggins prosecuted error and the Supreme Court of the United States held that the evidence was competent, ought to have been admitted, that the trial court erred in excluding it, and set aside the conviction and reversed the judgment.

Mr. Justice Miller, who delivered the opinion of the Court, said (p. 470) that:

"Now, when, under all these circumstances, the witness, and the only witness who was present at the encounter, swears that he can not tell where the first shot came from, though he knows that defendant only fired three, it must be very apparent that if the person to whom the deceased exhibited that pistol a few minutes before the shooting had been permitted to tell the jury that deceased then said, 'he would kill defendant before he went to bed that night,' it would have tended strongly to show where the first shot came from, and how that pistol with one chamber emptied came to be found on the ground. *This testimony might*, in a state of mind produced on the jury by the other evidence we have considered, *have turned the scale in favor of defendant.* At all events, we are of opinion that in that condition of things it was relevant to the issue and should have been admitted. Judgment reversed, with directions to set aside the verdict and grant a new trial."

The rules have been illustrated by many cases. Thus in *Allison vs. Horning*, 22 Ohio St., 138 (1871), the Court admitted evidence of the value of work at the time a contract was made therefor, as tending to show what the *agreed* price was, where the testimony was conflicting as to the agreed price. Judge Day, who delivered the opinion of the Court, said (at p. 142) that:

"The only point of difference between the parties was the *price* for which it was *agreed* the work should be done. The evidence was admitted for no other purpose than to enable the jury to decide which of the prices claimed by the respective parties was the true price agreed upon. * * * * It was of some value as tending to show the *improbability* of the claim of the defendant."

In *Tompkins vs. Starr*, 41 Ohio St., 305 (1884), the syllabus is as follows:

"Where T. claimed and had offered evidence to show that S., her brother, had agreed to furnish her a home as long as she lived, if she would act as his housekeeper, and S. claimed that by the arrangement between them T. was to be his housekeeper only so long as they could agree, or as long as they should get along together. *Held:* That it was competent for S. as tending to support his claim to prove that T. was a person of peevish, nervous, and disagreeable temper, and that none of her relatives who had tried to live with her could do so; and that these facts were known to S. when the arrangement to live together was made."

Judge McCauley, who delivered the opinion of the Court, said (p. 306) that:

"If the plaintiff was of such peevish and disagreeable temper that none of her relatives could live with her, and this was known to the defendant when the arrangement to keep house was made, these facts would strengthen the *probability* that the arrangement was temporary, as claimed by the defendant, rather than for life, as claimed by the plaintiff."

In *Dyer vs. Isham*, 4 Ohio Circuit Court Reports, 429 (1890), a debt had been discharged by bankruptcy proceedings. The plaintiff testified that after the bar defendant had acknowledged and promised to pay the debt, the defendant on the witness stand denied making such promise. The plaintiff thereupon attempted to prove that at the time of making the alleged promise the defendant was worth $25,000 over and above his liabilities *as rendering probable* the testimony of the plaintiff that the defendant had promised to pay the debt after the bar. The trial court excluded the evidence, and this was assigned for error. The Circuit Court reversed the judgment, holding the testimony competent for the purposes for which it was offered. The opinion was delivered by Judge James M. Smith, who is regarded, by the bench and bar of Ohio, as one of the ablest members of her judiciary. He said (pp. 433-434) that:

"We are of the opinion that evidence of the financial condition of Mr. Isham at the time in question was relevant—that the legitimate tendency of it, in connection with the other

facts proved in the case, would have been to show *that the proposition as to the promise which was in issue was more or less probable.* It would seem to us that a man in independent circumstances, or of large means, whose friend had paid debts for him from which he was legally discharged, but which he had declared should be paid in full, would be much more likely to bind himself by a promise to pay them, than if he were in reduced circumstances, and had barely sufficient to maintain himself or family. Of course, such evidence of itself would be of little weight, for we recognize the fact that a man of great wealth, while admitting the justice of such claims upon him, might have declined under the circumstances named to bind himself to the payment of these barred debts. *But we think the experience of men has shown that it is more probable that a man of ample means should do this, than one who was not financially able to do so.*

"But whether this be so or not, if such evidence would have had the tendency to make the fact as to the promise having been made more or less improbable, still it should have gone to the jury. The safer and more satisfactory rule is for the judge to admit whatever is relevant and leave the question of its weight for the jury."

In *Holman vs. Raynesford*, 44 Pacific Reporter (Kansas), 910, (1896), the Court held it relevant to show the circumstances surrounding the transaction in controversy, the relations of the parties to each other and to the transaction, for the purpose of aiding the jury in judging of the reasonableness of the respective claims of the parties, who testified directly contradictory to each other.

In the case on trial, the admitted evidence discloses that Captain Frank Loesewitz and Mr. Herman Keck were strangers; that he did not know Mr. Keck's name, but remembered his face; that Mr. Herman Keck was President of The Coetermans-Henricks-Keck Diamond Cutting Company, of Cincinnati, which company was engaged in cutting diamonds; that Mr. Herman Keck was a gentleman of large means, whose high character, reputation, and integrity was sustained by six of the leading business men of the City of Cincinnati, including its Mayor (original record, pp. 154–160; printed, pp. 80–83). The witness, Captain Frank Loesewitz, testified that he had never seen Mr. Keck but once in his

life, then for about fifteen to thirty minutes, in going from the residence of Mr. Van Hammelrick to the Café Alsacienne, drinking a glass of beer, Mr. Van Hammelrick handing Captain Loesewitz a package of diamonds, and walking a half square on the Place Verte; that the only words testified as having been spoken by Mr. Herman Keck, were "by Adams Express." Mr. Herman Keck, plaintiff in error, positively and categorically denied the alleged meeting and transaction. Under the rules laid down, and the circumstances stated, it can not be disputed that the evidence offered in behalf of Mr. Herman Keck, that he and his company dealt wholly in rough diamonds, could not use cut diamonds, never carried diamonds of the character alleged to have been smuggled, had no motive to smuggle, were relevant as rendering probable the testimony of Mr. Herman Keck and improbable that of Captain Frank Loesewitz as to the transaction alleged to have taken place in the Café Alsacienne and upon the Place Verte and the claimed identification of Mr. Keck.

We do not contend that a man without motive may not smuggle, but we do contend that the evidence offered had a tendency to show the probability of the testimony of Mr. Herman Keck and the improbability of this testimony of Captain Frank Loesewitz, especially as they directly contradicted each other as to the alleged main transaction. A Court has no discretion to exclude legal evidence merely because the trial judge does not attach much weight to it, as its weight is for the jury. Taken in its entirety, the testimony offered in the trial was the most important evidence that Mr. Keck had to offer. If the Court had admitted the evidence, as it should have done, it would have turned the scales and have been, at least, sufficient to raise a reasonable doubt, to the benefit of which the defendant was entitled. Mr. Justice Miller (at p. 470), in *Wiggins vs. People, etc., in Utah*, 93 U. S., 465, (1876).

Second. The Court sustained an objection to a question

(original record, p. 161; printed, p. 84) put to the witness, Mr. Constant Van Reeth, and the error arose as follows:

The witness, Captain Loesewitz, called on behalf of the United States, testified that when Mr. Van Hammelrick gave him the package of diamonds, the stranger, whom he identified as Mr. Keck, gave him the slip of paper with the name of T. Van Reeth upon it (original record, p. 62; printed, pp. 24–25), that he did not know Mr. Van Reeth, and that he may have heard the name Van Reeth, may have read the newspapers and seen the name Van Reeth therein. When shown a newspaper with Mr. Van Reeth's picture therein, witness testified that he may have seen it, but did not recollect (original record, p. 85; printed, p. 39). The piece of paper upon which Captain Loesewitz testified the stranger had written the name Van Reeth was not produced or spoken of by Captain Loesewitz at his arrest, February 11, at his hearing, February 12, or at any time at any conversation, and was produced for the first time March 18, at the hearing of Mr. Keck before Commissioner Bell. This is testified to by Mr. Gallen, a witness called by the United States (original record, p. 107; printed, p. 52; eleventh line from the bottom).

Mr. Herman Keck, plaintiff in error, produced, among other witnesses, Constant Van Reeth. Among other things he was asked in reference to his father, as follows (original record, p. 161; printed, p. 84), to wit:

Q. "Was his name mentioned in the papers at the time he left?"

A. (Objected to.)

Mr. Shields: I offer to prove that at least one year, and during a period of one year, prior to the 27th day of January, 1896, the name of F. Van Reeth frequently appeared in the public prints of Antwerp, referred to by Captain Loesewitz in his testimony, and that it was well known through the public prints, and by the knowledge that the people of Antwerp had, that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business.

(Objected to; objection sustained; exception allowed for defendant.)

This ruling of the Court is assigned as number eight in the assignment of errors (original record, pp. 214–215; printed, p. 115).

This testimony was material because Captain Frank Loesewitz, a witness for the United States, testified that he did not know Franz Van Reeth (original record, p. 84; printed, p. 38); and Mr. Franz Van Reeth, a witness for Mr. Herman Keck, testified that he had known Captain Loesewitz for twelve years (original record, p. 174; printed, p. 92).

This assignment of error presents another question under the rules of relevancy. The prosecuting witness, Captain Frank Loesewitz, had been indicted three months before the finding of the indictment against Mr. Herman Keck, and for the same offenses charged against Mr. Herman Keck, and expected to better his condition by testifying against Mr. Keck (original record, p. 90; printed, p. 42). He has never to this day been put on trial. Although arrested February 11, 1896, and claiming to have given up the diamonds, and to have fully disclosed his relations thereto within a few days after his arrest, he did not disclose to anybody the claimed existence of or produce the paper containing the name Van Reeth until the hearing of Mr. Keck before the United States Commissioner, March 18th, 1896, although claiming to have carried the paper in his pocket since the claimed meeting in the Cafe Alsacienne, January 27, 1896. That the paper was spurious was evidenced by the long delay in producing it, the discrepancy between the letter T and the name Franz; the absence of evidence as to handwriting; that Mr. Franz Van Reeth testified that he had known Captain Loesewitz twelve years; that Captain Loesewitz admitted that he might have known the name F. Van Reeth and might have seen Mr. Van Reeth's picture in a paper. It was therefore competent to prove that in the newspapers read by Captain Loesewitz, Mr. Van Reeth's name and picture frequently appeared, accompanied by the statement that Mr. F. Van

Reeth had gone to Cincinnati to engage in the diamond business (original record, p. 161; printed, p. 84). This was especially important in view of the fact that the witness, Captain Loesewitz, did not know Mr. Keck by name (original record, p. 83; printed, p. 37) and that Captain Frank Loesewitz had ample opportunity and time during his trip to Europe between the date of his arrest, February 11th, 1896, and the hearing of Mr. Keck, before the United States Commissioner, February 18th, 1896, to manufacture this evidence, because it was on March 18th, 1896, he, for the first time, identified Mr. Keck. It is a fair hypothesis to say that Captain Frank Loesewitz may have manufactured this spurious paper, and the evidence offered tended to render *improbable* the evidence that Mr. Keck had given him the paper in the Cafe Alsacienne.

VI.

Charge of Court to Jury — Part Excepted to.

(1.) Where the counts of an indictment omit substantial allegations, and have been duly demurred to, such omissions can not be supplied by a verdict induced by an instruction of the Court.

(2.) A charge of a Court to a jury should cover the whole case, and not single out parts of the testimony of one witness. The whole case, on all of the evidence, should be submitted to the jury, and the jury must find from all of the evidence that the defendant is guilty beyond a reasonable doubt, and that the evidence is inconsistent with any reasonable hypothesis of innocence and consistent with every reasonable hypothesis of guilt.

(2a.) The defendant was charged with importing contrary to law and with smuggling diamonds. A Sea Captain, who claimed that the defendant procured him to smuggle the diamonds, was the only percipient witness to the transaction. He testified (a) that a friend in the presence of the defendant gave him the diamonds; (b) that the defendant gave him a slip of paper with the name and address of T. Van Reeth thereon; (c) that he had been in the habit of bringing over similar small packages and *always* reporting them to the revenue officer upon the dock. The Court charged the jury, that if they believed the statements of the Captain, under oath, "respecting his receipt of the package of diamonds in Antwerp and bringing them here," to find the defendant guilty. Such charge is erroneous as not covering the whole case, or the testimony of all the witnesses or all of the testimony of one witness, and withdraw from the jury certain hypotheses material to the question of guilt.

The story told by Captain Frank Loesewitz on the witness stand has been heretofore given in substance (this brief, pp. 36–38). In reference to the same the Court charged the

jury as follows (original record, p. 208; printed, p. 112), to wit:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To that much of the charge Herman Keck, plaintiff in error, the jury being then and there at the bar of the Court, then and there excepted, which exception was then and there duly allowed by the Court (original record, pp. 209–210; printed, p. 113), and the same appears as assignment number seventeen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for writ of error (original record, pp. 226–227; printed, p. 120).

The portions of the charge of the Court excepted to, was erroneous for seven reasons, to wit:

First. The first count of the indictment had been demurred to as being insufficient in substance (this brief, pp. 22–25). Being thus fatally defective, and having been duly demurred to, it could not be cured by a verdict induced by a charge of the Court. *Moore vs. United States*, 160 U. S., 268 (1895).

Second. The second count of the indictment had been demurred to as being insufficient in substance, because diamonds were on the free-list, and not subject to duty (this brief, pp. 25–29). Being thus fatally defective, and having been duly demurred to, it could not be cured by a verdict induced by a charge of the Court. *Moore vs. United States*, 160 U. S., 268 (1895).

Third. The second count of the indictment had been demurred to as being insufficient in substance, because some diamonds were on the free-list under the generic term of "diamonds," and others were dutiable, and the indictment simply alleged the smuggling of "diamonds" without describing what kind of diamonds. (This brief, pp. 25–27; pp. 29–35.) Being thus fatally defective, and having been duly

demurred to, it could not be cured by a verdict induced by a charge of the Court. *Moore vs. United States*, 160 U. S., 268 (1895). This count in the case on trial arises under a different law, and is different in wording, from the counts in the case of *Dunbar vs. United States*, 156 U. S., 185 (1895). In the case cited, paragraph 48 of Section 1 of the act of October 1, 1890, Chapter 1244, 26 U. S Statutes at Large, 567 placed a duty of $12.00 per pound on opium "prepared for smoking" (opinion of Court, p. 189). The third count of the first indictment charged the smuggling of "prepared opium subject to a duty of $12.00 per pound" (statements of Court, p. 187). The second, fourth, and fifth counts of the second indictment charged the smuggling of "prepared opium subject to a duty of $12.00 per pound." (Statement Court, p. 187–8.) The Court held, that as but one kind of "prepared opium" was named in the statute, that it was unnecessary to have alleged that it was prepared "for smoking." The second indictment also stated that it was "prepared opium," subject to a duty of $12.00 per pound. In the case at bar the only word used was "diamonds," without prefix or suffix. In the case cited the adjective "prepared" was a prefix, which took it out of the generic term "opium." If the indictment had charged the smuggling of "opium subject to duty," the cases would, to that extent, been parallel. In the case cited, there was no demurrer to the indictment, while in the case at bar there was. In the case cited the indictment descended to particulars, but did so in a faulty *manner*; in the cast at bar the indictment gave a generic term, and did not descend to particulars; the *first* was a case of *form and manner* of allegation; the *latter, an omission of a matter of substance.* We have heretofore stated the law and allegations of this count (brief, pp. 29–35), and in addition to the cases there cited refer the Court to *United States vs. Hess*, 124 U. S., 483 (1887); *Pettibone vs. United States*, 148 U. S., 197 (1893); *Evans vs. United States*, 153 U. S., 584, 587 (1893); *United States vs. Mann*, 95 U. S., 580 (1877); *United States vs. Carll*, 105 U. S., 611, 612 (1881).

Fourth. We have heretofore contended that upon the facts there could be no legal conviction of smuggling or attempting to smuggle (brief, 35–48). This charge should have put certain hypotheses to the jury, which, if they found established from all the evidence beyond a reasonable doubt, to find the defendant guilty, and not two isolated occurrences forming but a part of the testimony of one witness. 2 Thompson on Trials, Section 2505.

Fifth. The third count of the indictment was attempted to have been drawn under Section 3028 of the Revised Statutes of the United States, in that there was a violation of Section 2802 of the Revised Statutes of the United States. This was duly demurred to. But as the Court instructed the jury to render a verdict of not guilty thereon (original record, p. 206; printed, 111), it takes it out of the discussion.

Sixth. This charge of the Court was erroneous because it did not cover the whole case. The rule is thus laid down in 2 Thompson on Trials, Section 2328, to wit:

"Instructions should cover the whole case, and should not be so framed as to single out isolated portions of the evidence not in themselves decisive. * * * * But the error of singling out isolated facts, not in themselves decisive of the merits of the controversy, and instructing the jury that if they believe such facts they will find for one party or the other, is not regarded as non-direction, but as mis-direction, and an invasion of the province of the jury. It is a frequent and penicious error, for which judgments are constantly reversed. * * * * On the trial of an indictment for an assault with intent to murder, the law presumes the defendant innocent of the felony, unless the whole evidence satisfies the jury that he made the assault with the particular intent alleged in the indictment. In such a case it is error for the Court, in charging the jury, to select from the mass of the evidence a portion only of the facts disclosed by it, and to declare that if such facts are proved, the law presumes that the act was malicious, and that the defendant intended to kill. Such a charge takes away from the defendant the presumption of innocence upon the selected facts only; whereas, according to law, that presumption can not be taken away except by a conviction of the guilt produced on the minds of the jury, by the whole evidence."

This rule has been frequently affirmed in numerous cases, in among others *Clement vs. Packer*, 125 U. S., 309 (1887); *Inland & S. Coasting Co. vs. Tolson*, 139 U. S., 551 (1891); *Adams vs. Roberts*, 2 Howard, 486 (1844); *Jewell vs. Jewell*, 1 Howard, 219 (1843); *Greenleaf vs. Birth*, 9 Peters, 292 (1838).

In *Clement vs. Parker*, 125 U. S., 309 (1887), while the trial court did not positively and imperatively direct the jury to find for the plaintiff, it was, in its logical effect, a syllogysm; its major premises was a general rule as to the effect of the absence of certain evidence and its minor premises that there was not said certain evidence (p. 327). The conclusion was easy, that *upon the evidence singled out*, to find for the plaintiff. Mr. Justice Lamar, who delivered the opinion of the Court reversing the judgment, said (p. 327) that:

"The direct tendency, if not the avowed purpose, of the statements contained in this charge, is to withdraw from the consideration of the jury a very considerable amount of pertinent and important testimony for the defense."

In this portion of the judge's charge excepted to, the court limited the inquiry to the testimony of Captain Loesewitz "*respecting his receipt of the package and bringing it here.*" The Court left to the jury no alternative but to find defendant guilty if they believed the Captain's testimony in these two particulars. It did not leave the jury all the evidence in the case, or even all of the evidence of Captain Loesewitz, but singled out two parts of the testimony of the Captain Loesewitz. This was to withdraw from the jury all the testimony of all the witnesses except two parts of the testimony of Captain Loesewitz. All other testimony, except, as it might bear upon the veracity of Captain Losewitz, was thus excluded. The defendant, Herman Keck, was presumed to be innocent until proven to be guilty beyond a reasonable doubt, and he was entitled to the benefit of any reasonable doubt arising from *all* the evidence. If there were any reasonable hypotheses consistent with his innocence or

inconsistent with his guilt, he should have been acquitted. The case turned on the claimed ability of the witness, Captain Frank Loesewitz, to identify Mr. Herman Keck, a stranger whose name he did not know, whom he had seen for less than half an hour, during which the stranger took no part in a conversation carried on in Flemish between Captain Loesewitz and Mr. Van Hammelrick. The only words claimed to have been spoken by Mr. Keck were the words "by Adams Express," testified to as having been spoken by him in English, after leaving the Cafe Alsacienne, and while on the Place Verte. There was no evidence that the diamonds were manufactured or purchased at Antwerp, and no Consular invoice was necessary. (Act June 10, 1890, 26 U. S. Statutes at Large 131, Section 3). These diamonds were personal effects accompanying Captain Frank Loesewitz, a passenger on his own vessel. (Same Act, Section 4.) The witness, Captain Frank Loseewitz, further testified that he had been in the habit of bringing over similar small packages, in the same way that he brought over the package involved in the case on trial, and that after the vessel had been docked, he would go to a custom officer on the dock and report the fact, but that in this case he had no time to go on the dock, as the Treasury agents came aboard before he had an opportunity to go upon the dock. (Original record, pp. 81-82; printed, pp. 36-37.) The defendant was entitled to the benefit of the usual custom of the Captain in such matters, to show that there was no intention not to submit them to the officer of the revenue for examination. (Anti-moiety act, June 22, 1874, 18 U. S. Statutes at Large 186, Section 4.) This was a pertinent hypothesis, which the Court took from the consideration of the jury, when it limited their deliberations to the mere truthfulness of Captain Loesewitz's evidence on the two point of "*his receipt of the package of diamonds in Antwerp and bringing them here.*" The defendant was entitled to the benefit of the doubt, which might be raised, by the

uniform custom of the Captain in submitting such packages to the custom officials for examination. The jury might have believed the two propositions to which the jury were limited, and still had a doubt as to defendant's guilt. *There was nothing said at the Cafe Alsacienne as to smuggling of the diamonds, or omitting to submit the same to the officers of the revenue for examination, after the arrival of the ship in port.* If things had taken their usual course, and Revenue Officer Gallen had not been over zealous, in the ordinary course of events this package would have been submitted to the revenue officers for examination in a way different than they were submitted. (This brief, pp. 45–46.) The mere fact that Captain Loesewitz may have incurred penalties for the omission of formalities, does not affect the question of the charge contained in the second count of the indictment, or the fact that bringing over packages on former occasions, and submitting them to the officers of the revenue, had not subjected him to penalties. It was wrong for the Court to take from the jury all of the evidence of all of the witnesses, including Captain Loesewitz, except two very small portions of Captain Loesewitz's testimony, save as it might bear on Captain Loesewitz's veracity. This action of the Court was doubly prejudicial, as it was a case of identity and of oath against oath.

Seventh. Said portion of the charge was erroneous as it directed attention to the testimony of one witness to the exclusion of all other witnesses. 2 Thompson on Trials, Section 2421.

In *Ott vs. Oyer's Executors*, 106 Pa. St., 6 (1884), the Court, among other things, charged the jury (18) that:

"If, then, you are satisfied from the testimony of Phillips and Ott that when this note was given by William Ott to John Oyer," etc.

There had also been introduced the evidence of a witness named Bogardus.

The Court, in reversing the judgment because of this instruction, said:

"All the evidence tending to establish the facts in issue was for consideration of the jury, and in so far as the Court excluded it, there was error."

In the case on trial the Court practically excluded the testimony of all the witnesses except that of Captain Frank Loesewitz, and even limited his to two particulars.

In *Brown vs. The United States*, 159 U. S., 100 (1895), Brown was indicted for killing Josiah Poorboy. There was conflict in the evidence as to what occurred when the shooting took place, but it appears with reasonable certainty that Brown shot and killed either Whitehead or Poorboy (p. 102). The defendant requested the Court to instruct the jury that if the defendant believed the persons attempting his arrest were not officers, and the killing was done in resisting the arrest, the crime would be manslaughter, but not murder. The Court gave the instruction with the following modification (p. 102), to wit:

"Unless such killing was done *in such a way* as to show brutality, barbarity, and a wicked and malignant purpose. If it was done in that way, then it would still be murder."

Mr. Justice Harlan, in delivering the opinion of the Court, said (p. 103) that:

"The jury might well have inferred, from the instruction, as modified, that they were at liberty to return a verdict of murder because alone of the *way* or *mode* in which the killing was done, even if they believed that, apart from the way in which the life of the deceased was taken, the facts made a case of manslaughter, and not of murder. We do not think that a verdict of guilty of manslaughter or murder should have turned alone upon an inquiry as to the way in which the killing was done. The inquiry rather should have been whether, at the moment the defendant shot, there were present such circumstances, taking all of them into consideration, including the mode of killing, as made the taking of the life of the deceased manslaughter and not murder."

VII.

Answer of Court to Request Number Ten for Special Instruction.

(1.) It is error for a Court in answer to the request for a special instruction to affirm said point generally, and at the same time practically withdraw all of the evidence of all of the witnesses from the jury, except two parts of the testimony of one witness.

(1a.) Defendant requested the Court to charge the jury, that a preponderance of the evidence is not sufficient, but that they must find the defendant guilty beyond a reasonable doubt from all of the evidence, and that the evidence must be consistent with hypothesis of guilt and inconsistent with any hypothesis of innocence. The Court answered affirming the request generally, but gave it the meaning that the jury should find the defendant guilty if they believed the defendant guilty of the smuggling charge as testified to by the prosecuting witness. The effect of such charge was to withdraw from the jury all of the evidence of all of the witnesses, except that of Captain Loesewitz, and confined his testimony to so much thereof as pertained to the smuggling charge, as testified to by him.

The error here assigned arose in the following manner, the Court, in its general charge to the jury, stated the following (original record, p. 209; printed, p. 113), to wit:

"Now, from a very careful examination of all the testimony heard on both sides, you must determine whether the defendant is guilty or not. If such an examination does not satisfy you beyond reasonable doubt of the defendant's guilt, you must acquit him. If it does so fully satisfy you of his guilt, you should convict him."

Upon this subject Herman Keck, plaintiff in error, requested the Court to give the following instruction to the jury (original record, p. 207; printed, p. 111–112), to wit:

"No. 10. The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt. A preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, *but the jury must be convinced beyond reasonable doubt, from the evidence*, that the defendant, Herman Keck, is guilty as charged. *Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence.*

The Court answered this request as follows (original record, p. 207; printed, p. 112), to wit:

"The Court affirms the 10th point generally, but the meaning ascribed to it by the Court is, that the jury shall be fully

convinced, from a careful examination of all the testimony heard, that the defendant is guilty of the smuggling charged, *as testified to, by Captain Loesewitz*, and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilty generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal, and should be acquitted."

Herman Keck, plaintiff in error, duly excepted to the answer of the learned Court, to the request for said instruction number ten (original record, p. 208; printed, p. 112), and the ruling of the Court was duly assigned as number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117).

This action of the Court was erroneous in two respects:

First. The Court was asked to instruct the jury that they must be convinced beyond a reasonable doubt, from all the evidence, of the defendant's guilt. The Court said that it affirmed the point generally, but confined the investigation to the one question of being convinced, from all the evidence, that the defendant was guilty of smuggling charged, *as testified to by Captain Loesewitz*. This much of the question has been heretofore discussed under the part of the charge excepted to (brief, pp. 72–76), and is subject to the same criticism as the modification of the charge in *Brown vs. United States*, 159 U. S., 100, 102, 103 (1894).

Second. The Court was asked in this instruction to say that before the jury could find the defendant guilty the evidence must be consistent with hypothesis of guilt and inconsistent with hypothesis of innocence. The Court, in its answer, while affirming the tenth point generally, nullified the question of hypotheses by confining the question of guilt to the smuggling charged, *as testified to by Captain Loesewitz*. This practically excluded all presumptions of innocence, all the testimony of all the witnesses, except Captain Loesewitz, save as it might bear upon his veracity; and all testimony of Captain Loesewitz as to his general custom in bringing

over such packages, which would have supported the hypothesis that he intended, as in all former cases, to submit this package to the revenue officers for examination. Wharton Criminal Evidence (9th Edition), Section 21, last sentence; 2 Thompson on Trials, Section 2505.

VIII.

Error for Refusing Application for Dedimus.

(1.) Revised Statues of the United States, Section 866, which provides that any court of the United States may grant a *dedimus potestatem* in any case where it is necessary in order to prevent a failure or delay of justice, applies to criminal cases.

(1a.) A person charged with smuggling presented proof in support of an application for a *dedimus* that (a) the prosecuting witness was in the habit and practice of smuggling; (b) that the prosecuting witness had carried a written order to Europe on the business card of a New Jersey merchant for the diamonds which were seized; (c) to show the nature of defendant's business in Europe; (e) that from amount of the prosecuting witnesses's income and expenditures, a part of his income was derived from sources other than his wages; (f) record evidence of the prosecuting witness's prosecution for other smuggling transactions; (f) the general bad reputation of the prosecuting witness for truth and veracity. The court denied the application because the statute did not apply to criminal cases, and that the circumstances did not call for its application at that time; that it did not appear but what witnesses could have been procured; and that the application came too late, and might have been made months before. The refusal of the Court was erroneous, because it made no finding that it was not necessary to prevent a failure of justice, and the action of the Court was based upon a misapprehension of law and fact.

The indictment was returned against Mr. Herman Keck, plaintiff in error, the 18th day of May, 1896, and eight days later, to wit: the 26th day of May, 1896, Mr. Herman Keck, plaintiff in error, moved to quash the indictment, demurred thereto, and upon the Court overruling same, filed a written application for a *dedimus potestatem* to take depositions at Amsterdam, Holland, and Antwerp, Belgium, in pursuance of Section 866 of the Revised Statutes of the United States, because the testimony to be taken was necessary to his defense, and necessary in order to prevent a failure of justice (original record, p. 18; printed, p. 6; original record, p. 47; printed, p. 16). In support thereof an affidavit was presented, setting forth important matters, which would clearly have

been material to him in his defense (original record, pp. 19–28; printed, pp. 6–9; original record, pp. 48–54; printed, pp. 17–20). The Court then and there overruled said application, to which ruling of the Court Mr. Herman Keck, plaintiff in error, excepted; which exception was then and there allowed by the Court (original record, p. 54; printed, p. 20), and set forth as number three in the assignment of errors (original record, p. 212; printed, p. 114), and set forth in the petition for a writ of error (original record, pp. 224–225; printed, p. 119). The following day, by leave of court, the United States presented an answer to the application for the *dedimus potestatem* (original record, pp. 28–32; printed, pp. 10–11; original record, pp. 54–58; printed, pp. 20–21). On the same day, the Court refused the application upon two grounds (original record, pp. 33–34; printed, p. 11; original record, p. 57; printed, p. 22).

The provision of the Revised Statutes under which this application was made is as follows, to wit:

"SECTION 866. *In any case* where it is necessary, in order to prevent a failure or delay of justice, *any of the courts of the United States* may grant a *dedimus potestatem*, to take depositions according to common usage; and any Circuit Court, upon application to it as a court of equity, may, according to the usages of Chancery, direct depositions to be taken in *perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of Sections 863, 864, and 865 shall not apply to any depositions to be taken under the authority of this section."

The application, which was made eight days after the indictment was found, was as follows (original record, p. 18; printed, p. 6), to wit:

"Now comes the defendant, Herman Keck, and moves the Court for a *dedimus potestatem*, to take depositions at Amsterdam, Holland, and Antwerp, Belgium, in pursuance of Section 866 of the Revised Statutes of the United States, and the testimony to be taken is necessary to his defense, and is necessary in order to prevent a failure of justice."

In support of this an affidavit was filed setting forth (original record, pp. 19–27; printed, pp. 6–9; original record. pp. 48–54; printed, pp. 17–20), that (1) Captain Frank Loesewitz was in the habit and practice of smuggling and charging therefor; (2) that Captain Loesewitz had carried a written order to Europe on the business card of a New Jersey merchant for the diamonds which were seized; (3) the exact nature of Mr. Herman Keck's business in Europe; (4) that from the amount of Captain Loesewitz's expenditures he must be deriving an income other than from his wages as captain; (5) record evidence as the Captain's connection with other smuggling transactions and prosecutions therefor, of which Mr. Herman Keck learned by cablegram eleven days before making his application for the *dedimus;* (6) that the general reputation of Captain Loesewitz for truth and veracity was bad.

The Government filed an answer, by leave of Court (original record, pp. 28–32; printed, pp. 10–11; original record, pp. 55–57; printed, pp. 20–21), in which was set forth: (1) that Section 866 did not apply to criminal cases; (2) that the application came too late; (3) that the evidence went to the credibility of said Captain Loesewitz, as a witness, and that the defendant would have been concluded by his answers thereto; (4) that no notice was given of the application, and the same was not made conformable with common usage; (5) that there were no interrogatories filed; (6) that Herman Keck, plaintiff in error, had the means to procure the attendance of the witnesses; and (7) that the matter rested in the discretion of the Court.

The Court refused the application on two grounds in the following language (original record, pp. 33–35; printed, pp. 11–12; original record, pp. 57–58; printed, p. 22), to wit:

"The application referred to yesterday is refused on two grounds:

"*First.* That the statute relied upon is not applicable to the criminal court, nor to trials of causes therein.

"*Second.* That if it was, the circumstances shown do not call for its application in this case at this time; that it does not appear that the presence of the witnesses could not have been procured by proper effort, and that if it did appear, it should be held that the application comes too late; that it might have been made months ago and all delay in consequence of it avoided."

We will consider the answer of the Court in its two parts:

First. Section 866 of the Revised Statutes of the United States does apply to criminal cases, and it has been so ruled in *United States vs. Wilder*, 14 Federal Reporter, 393 (1882), and *United States vs. Cameron, et al*, 15 Federal Reporter, 794 (1883).

Circuit Court Judge Pardee, who delivered the opinion of the Court in *United States vs. Wilder*, 14 Federal Reporter, 393, said:

"It is so abhorant to all ideas of justice, that a person charged with crime shall not have full opportunity to make his defense by witnesses, that although I am not prepared to hold that evidence taken as proposed in this case will be admitted on the trial, I am of the opinion that the commission and opportunity prayed for ought to be granted. Taking evidence in the manner asked in this case, may be, and probably is, unprecedented in the United States Courts in criminal cases, but I am informed is permitted in State Courts of Georgia, and is allowed by statute in other States. At all events, the Government can not be seriously prejudiced by allowing this commission, as it will, of course, be at the expense of the defendant, and its admissibility will be determined on the trial. When the evidence is taken and the case comes on for trial, its scope, force, and effect can be seen, and its admissibility to go before the jury determined, and if the defendant shall be deprived of his testimony before the jury because the law will not allow its consideration, and the defendant shall be convicted, the testimony will certainly be considered by the Judge who shall be called upon to exercise the large discretion given by the statute, in imposing sentence in the case. Let the commission issue as prayed for; the District Attorney to be served with the interrogatories to be propounded to witnesses, and to have three days thereafter to file cross-interrogatories, and the commission to be returned ten days before the next term of this Court."

Judge McCreery delivered a very elaborate opinion (in which Judge Treat concurred) in the case of the *United States vs. Cameron et al*, 15 Federal Reporter, 794 (1883).

1 Foster's Federal Practice (2d Ed.), Section 288, p. 518, accepts these decisions without question.

Second. The learned Trial Court gave as a second reason for refusing the application, that the circumstances did not call for its application *at that time*. Captain Loesewitz's name appeared indorsed upon the indictment as the prosecuting witness. It was a case of oath against oath. It would become very important to impeach his testimony by documentary evidence and testimony of his bad reputation for truth and veracity. It was proper to show his business relations with the New Jersey merchant, with whom he admitted he had long relations of friendship (original record, pp. 72–73; printed, p. 31), and from whom Captain Loesewitz obtained a business card (original record, pp. 73–74; printed, pp. 31–32), which Captain Loesewitz gave to Mr. Van Hammelrick (original record, p. 75; printed, p. 32). The Court further stated that Herman Keck could have procured the presence of these witnesses from Europe. In this the learned Trial Court was clearly mistaken, because there was no evidence that they would cross the ocean, and it is not to be supposed that the business men mentioned in the affidavit, or Mr. Van Hammelrick, who was accused by Frank Loesewitz with being mixed up in the transaction, would come to America; and, in addition, there were other witnesses, whose names Mr. Herman Keck could not then give; and there was documentary evidence, information of which he had just received. The learned Trial Court further stated that the application came too late, as it might have been made months before. In this the learned Trial Court was clearly mistaken, both in law and in fact, because the indictment was returned eleven days before the application was made, and Mr. Herman Keck was arraigned on the 27th day of May, 1896, the day of the second

refusal of the application and the day following the first refusal thereof. To be sure, Mr. Keck had been arrested February 14, and bound over to the Grand Jury March 18, and indicted May 18, 1896. He was not compelled to anticipate an indictment, and had a right to rely on the protection of Article VI of the Amendments to the Constitution, that he could not be called upon *to answer* to a criminal charge until accused by the indictment of a Grand Jury.

If it be said that this was a matter within the discretion of the Trial Court, that discretion was grossly abused, and the conclusions of the learned Trial Judge in his attempted exercise of discretion was based upon erroneous conceptions of clear and admitted facts appearing upon the records of his own court.

The United States District Attorney claims he had no notice, but that he did have, is shown by his asking and obtaining leave of Court to file an answer (original record, p. 54; printed, p. 20), which was done.

It was unnecessary, as set forth in the answer of the District Attorney, that he should have been furnished with interrogatories, because the interrogatories are prepared and filed after the making of an order allowing the *dedimus*, as was done in the case of *United States vs. Wilder*, 14 Federal Reporter, 393 (1882). The same rule is laid down in 1 Foster's Federal Practice (2d Ed.), Section 288. At all events, the Court overruled the application upon two grounds mentioned in the answer, filed by the United States District Attorney, and virtually thereby overruled the other grounds. Nor, as contended by the learned District Attorney, does the manner of granting depend on common usage, but, as the statute says, the taking of the evidence, after the *dedimus* is issued, is to be according to common usage. (Rev. Stat. U. S., Sec. 866.)

Section 866 of the Revised Statutes of the United States provides for the issuing of a *dedimus potestatem* in any case where it is necessary, in order to prevent a failure or delay of

justice. The affidavit filed made out a *prima facie* case for a *dedimus*. The Court did not rule or find that it was not necessary in order to prevent a failure or delay of justice. If it had assigned this reason, a more difficult question might have arisen. But the Court gave other reasons for its refusal. Of course, we concede that the Court said that the application might have been made months before, and all delay in consequence of granting it avoided, but as the Court was laboring under a misapprehension of law and fact, an error was committed, and the action of the Court was not the exercise of discretion.

IX.

Sentence Erroneous.

(1.) Revised Statutes of the United States, Section 5541, only authorizes a sentence of imprisonment in the penitentiary within the district or State where the Court is held where the sentence is for a period longer than one year. If the sentence be for one year, the Court has no power under said Section 5541.

(1a.) Where a person was indicted and convicted for a violation of Section 2865, and Section 3082 of the Revised Statutes of the United States, for smuggling and importing contrary to law, in the United States District Court for the Eastern District of Pennsylvania, and sentenced for a period of one year, the Court has no power to order his confinement and imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania.

The Court having overruled a motion for a new trial, proceeded to pronounce sentence (original record, p. 45; printed, pp. 15-16), as follows, to wit:

"And thereupon, on the 9th day of June, A. D. 1896, all and singular, the premises being seen and by the Court here fully understood, it is considered and adjudged that the defendant, Herman Keck, pay to the United States a fine of $200.00; that he be imprisoned and confined in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year; that he pay the costs of the prosecution, and stand committed until judgment be fully complied with, and that he be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of said Commonwealth."

Revised Statutes of the United States, Section 5541, provides that in every case where any person is convicted of any

offense against the United States, is sentenced to imprisonment *for a period longer than one year*, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held. Supreme Court of the United States, in *Bonner's case*, 151 U. S., 242 (1894), held, that imprisonment in the said penitentiary was only permissible where the sentence was for a period longer than one year. In the case on trial the sentence was not longer than one year, and was but for one year and the payment of a fine. In the case cited the Court held that the sentence was null and void, as being beyond the power of the Court, and discharged the petitioner on a writ of *habeas corpus*. Nor does the act of July 12, 1876, 19 U. S. Statutes at Large, 88, amending Section 5546 of the Revised Statutes of the United States, in any way change the rule as declared in *Bonner's case*, 151 U. S., 242 (1894).

IN CONCLUSION.

The three counts of this indictment were fatally defective, as omitting matters of substance. All ways of raising their defects were taken, including a demurrer. The defendant was rushed into a trial eleven days after his accusation, and denied the privilege of taking testimony in Europe, where the main transaction was alleged to have taken place, where the prosecuting witness lived, whose testimony it was desired to impeach. The application for a *dedimus potestatem* was denied upon conclusions based upon premises, fallacious in law and fact. The case was oath against oath, and turned upon imperfect identification. Hearsay evidence was admitted and relevant evidence excluded. All the evidence admitted did not make a crime, on the counts of the indictment as drawn. The jury were confined to but small parts of the testimony of but one witness, and all other evidence was excluded, except as it might bear upon the veracity of the prosecuting witness.

Special instructions were modified to exclude, in effect, the doctrine that all the evidence must be consistent with a reasonable hypothesis of guilt and inconsistent with a reasonable hypothesis of innocence. An illegal sentence was imposed. Vital errors, prejudicial to the rights of Mr. Herman Keck, plaintiff in error and a citizen of the United States, were committed, and he was denied a fair and impartial trial, guaranteed to him by the Constitution of the United States, while an alien was shielded from attacks as to his veracity and criminality. This conviction should be set aside, the indictment quashed, and Mr. Herman Keck freed from an annoying prosecution, so that he might go about his way developing the new and great diamond cutting industry at Cincinnati, which he attempted to bring to the attention of the Court by his *dedimus potestatem* and the excluded evidence of the witness Mr. Franz Van Reeth.

Respectfully submitted,

RANKIN D. JONES,
FRANCIS B. JAMES,
Counsel for Herman Keck, Plaintiff in Error.

CINCINNATI, O., November 28, 1896.

In support of this an affidavit was filed setting forth (original record, pp. 19–27; printed, pp. 6–9; original record. pp. 48–54; printed, pp. 17–20), that (1) Captain Frank Loesewitz was in the habit and practice of smuggling and charging therefor; (2) that Captain Loesewitz had carried a written order to Europe on the business card of a New Jersey merchant for the diamonds which were seized; (3) the exact nature of Mr. Herman Keck's business in Europe; (4) that from the amount of Captain Loesewitz's expenditures he must be deriving an income other than from his wages as captain; (5) record evidence as the Captain's connection with other smuggling transactions and prosecutions therefor, of which Mr. Herman Keck learned by cablegram eleven days before making his application for the *dedimus;* (6) that the general reputation of Captain Loesewitz for truth and veracity was bad.

The Government filed an answer, by leave of Court (original record, pp. 28–32; printed, pp. 10–11; original record, pp. 55–57; printed, pp. 20–21), in which was set forth: (1) that Section 866 did not apply to criminal cases; (2) that the application came too late; (3) that the evidence went to the credibility of said Captain Loesewitz, as a witness, and that the defendant would have been concluded by his answers thereto; (4) that no notice was given of the application, and the same was not made conformable with common usage; (5) that there were no interrogatories filed; (6) that Herman Keck, plaintiff in error, had the means to procure the attendance of the witnesses; and (7) that the matter rested in the discretion of the Court.

The Court refused the application on two grounds in the following language (original record, pp. 33–35; printed, pp. 11–12; original record, pp. 57–58; printed, p. 22), to wit:

"The application referred to yesterday is refused on two grounds:

"*First.* That the statute relied upon is not applicable to the criminal court, nor to trials of causes therein.

"*Second.* That if it was, the circumstances shown do not call for its application in this case at this time; that it does not appear that the presence of the witnesses could not have been procured by proper effort, and that if it did appear, it should be held that the application comes too late; that it might have been made months ago and all delay in consequence of it avoided."

We will consider the answer of the Court in its two parts:

First. Section 866 of the Revised Statutes of the United States does apply to criminal cases, and it has been so ruled in *United States vs. Wilder*, 14 Federal Reporter, 393 (1882), and *United States vs. Cameron, et al*, 15 Federal Reporter, 794 (1883).

Circuit Court Judge Pardee, who delivered the opinion of the Court in *United States vs. Wilder*, 14 Federal Reporter, 393, said:

"It is so abhorant to all ideas of justice, that a person charged with crime shall not have full opportunity to make his defense by witnesses, that although I am not prepared to hold that evidence taken as proposed in this case will be admitted on the trial, I am of the opinion that the commission and opportunity prayed for ought to be granted. Taking evidence in the manner asked in this case, may be, and probably is, unprecedented in the United States Courts in criminal cases, but I am informed is permitted in State Courts of Georgia, and is allowed by statute in other States. At all events, the Government can not be seriously prejudiced by allowing this commission, as it will, of course, be at the expense of the defendant, and its admissibility will be determined on the trial. When the evidence is taken and the case comes on for trial, its scope, force, and effect can be seen, and its admissibility to go before the jury determined, and if the defendant shall be deprived of his testimony before the jury because the law will not allow its consideration, and the defendant shall be convicted, the testimony will certainly be considered by the Judge who shall be called upon to exercise the large discretion given by the statute, in imposing sentence in the case. Let the commission issue as prayed for; the District Attorney to be served with the interrogatories to be propounded to witnesses, and to have three days thereafter to file cross-interrogatories, and the commission to be returned ten days before the next term of this Court."

Judge McCreery delivered a very elaborate opinion (in which Judge Treat concurred) in the case of the *United States vs. Cameron et al*, 15 Federal Reporter, 794 (1883).

1 Foster's Federal Practice (2d Ed.), Section 288, p. 518, accepts these decisions without question.

Second. The learned Trial Court gave as a second reason for refusing the application, that the circumstances did not call for its application *at that time*. Captain Loesewitz's name appeared indorsed upon the indictment as the prosecuting witness. It was a case of oath against oath. It would become very important to impeach his testimony by documentary evidence and testimony of his bad reputation for truth and veracity. It was proper to show his business relations with the New Jersey merchant, with whom he admitted he had long relations of friendship (original record, pp. 72–73; printed, p. 31), and from whom Captain Loesewitz obtained a business card (original record, pp. 73–74; printed, pp. 31–32), which Captain Loesewitz gave to Mr. Van Hammelrick (original record, p. 75; printed, p. 32). The Court further stated that Herman Keck could have procured the presence of these witnesses from Europe. In this the learned Trial Court was clearly mistaken, because there was no evidence that they would cross the ocean, and it is not to be supposed that the business men mentioned in the affidavit, or Mr. Van Hammelrick, who was accused by Frank Loesewitz with being mixed up in the transaction, would come to America; and, in addition, there were other witnesses, whose names Mr. Herman Keck could not then give; and there was documentary evidence, information of which he had just received. The learned Trial Court further stated that the application came too late, as it might have been made months before. In this the learned Trial Court was clearly mistaken, both in law and in fact, because the indictment was returned eleven days before the application was made, and Mr. Herman Keck was arraigned on the 27th day of May, 1896, the day of the second

refusal of the application and the day following the first refusal thereof. To be sure, Mr. Keck had been arrested February 14, and bound over to the Grand Jury March 18, and indicted May 18, 1896. He was not compelled to anticipate an indictment, and had a right to rely on the protection of Article VI of the Amendments to the Constitution, that he could not be called upon *to answer* to a criminal charge until accused by the indictment of a Grand Jury.

If it be said that this was a matter within the discretion of the Trial Court, that discretion was grossly abused, and the conclusions of the learned Trial Judge in his attempted exercise of discretion was based upon erroneous conceptions of clear and admitted facts appearing upon the records of his own court.

The United States District Attorney claims he had no notice, but that he did have, is shown by his asking and obtaining leave of Court to file an answer (original record, p. 54; printed, p. 20), which was done.

It was unnecessary, as set forth in the answer of the District Attorney, that he should have been furnished with interrogatories, because the interrogatories are prepared and filed after the making of an order allowing the *dedimus*, as was done in the case of *United States vs. Wilder*, 14 Federal Reporter, 393 (1882). The same rule is laid down in 1 Foster's Federal Practice (2d Ed.), Section 288. At all events, the Court overruled the application upon two grounds mentioned in the answer, filed by the United States District Attorney, and virtually thereby overruled the other grounds. Nor, as contended by the learned District Attorney, does the manner of granting depend on common usage, but, as the statute says, the taking of the evidence, after the *dedimus* is issued, is to be according to common usage. (Rev. Stat. U. S., Sec. 866.)

Section 866 of the Revised Statutes of the United States provides for the issuing of a *dedimus potestatem* in any case where it is necessary, in order to prevent a failure or delay of

justice. The affidavit filed made out a *prima facie* case for a *dedimus*. The Court did not rule or find that it was not necessary in order to prevent a failure or delay of justice. If it had assigned this reason, a more difficult question might have arisen. But the Court gave other reasons for its refusal. Of course, we concede that the Court said that the application might have been made months before, and all delay in consequence of granting it avoided, but as the Court was laboring under a misapprehension of law and fact, an error was committed, and the action of the Court was not the exercise of discretion.

IX.

Sentence Erroneous.

(1.) Revised Statutes of the United States, Section 5541, only authorizes a sentence of imprisonment in the penitentiary within the district or State where the Court is held where the sentence is for a period longer than one year. If the sentence be for one year, the Court has no power under said Section 5541.

(1a.) Where a person was indicted and convicted for a violation of Section 2865, and Section 3082 of the Revised Statutes of the United States, for smuggling and importing contrary to law, in the United States District Court for the Eastern District of Pennsylvania, and sentenced for a period of one year, the Court has no power to order his confinement and imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania.

The Court having overruled a motion for a new trial, proceeded to pronounce sentence (original record, p. 45; printed, pp. 15–16), as follows, to wit:

"And thereupon, on the 9th day of June, A. D. 1896, all and singular, the premises being seen and by the Court here fully understood, it is considered and adjudged that the defendant, Herman Keck, pay to the United States a fine of $200.00; that he be imprisoned and confined in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year; that he pay the costs of the prosecution, and stand committed until judgment be fully complied with, and that he be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of said Commonwealth."

Revised Statutes of the United States, Section 5541, provides that in every case where any person is convicted of any

offense against the United States, is sentenced to imprisonment *for a period longer than one year*, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held. Supreme Court of the United States, in *Bonner's case*, 151 U. S., 242 (1894), held, that imprisonment in the said penitentiary was only permissible where the sentence was for a period longer than one year. In the case on trial the sentence was not longer than one year, and was but for one year and the payment of a fine. In the case cited the Court held that the sentence was null and void, as being beyond the power of the Court, and discharged the petitioner on a writ of *habeas corpus*. Nor does the act of July 12, 1876, 19 U. S. Statutes at Large, 88, amending Section 5546 of the Revised Statutes of the United States, in any way change the rule as declared in *Bonner's case*, 151 U. S., 242 (1894).

IN CONCLUSION.

The three counts of this indictment were fatally defective, as omitting matters of substance. All ways of raising their defects were taken, including a demurrer. The defendant was rushed into a trial eleven days after his accusation, and denied the privilege of taking testimony in Europe, where the main transaction was alleged to have taken place, where the prosecuting witness lived, whose testimony it was desired to impeach. The application for a *dedimus potestatem* was denied upon conclusions based upon premises, fallacious in law and fact. The case was oath against oath, and turned upon imperfect identification. Hearsay evidence was admitted and relevant evidence excluded. All the evidence admitted did not make a crime, on the counts of the indictment as drawn. The jury were confined to but small parts of the testimony of but one witness, and all other evidence was excluded, except as it might bear upon the veracity of the prosecuting witness.

Special instructions were modified to exclude, in effect, the doctrine that all the evidence must be consistent with a reasonable hypothesis of guilt and inconsistent with a reasonable hypothesis of innocence. An illegal sentence was imposed. Vital errors, prejudicial to the rights of Mr. Herman Keck, plaintiff in error and a citizen of the United States, were committed, and he was denied a fair and impartial trial, guaranteed to him by the Constitution of the United States, while an alien was shielded from attacks as to his veracity and criminality. This conviction should be set aside, the indictment quashed, and Mr. Herman Keck freed from an annoying prosecution, so that he might go about his way developing the new and great diamond cutting industry at Cincinnati, which he attempted to bring to the attention of the Court by his *dedimus potestatem* and the excluded evidence of the witness Mr. Franz Van Reeth.

Respectfully submitted,

RANKIN D. JONES,
FRANCIS B. JAMES,
Counsel for Herman Keck, Plaintiff in Error.

CINCINNATI, O., November 28, 1896.

No. 194 & 15.
Brief of Jones & James for U. S.
FILED
OCT 11 1897
JAMES D. MCKENNEY

Revised Brief of Plaintiff in Error reang

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RE-ARGUMENT.

Filed Oct. 11, 1897.

THE UNITED STATES OF AMERICA.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 194.

OCTOBER TERM, 1896.

No. 551.

HERMAN KECK, Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

RANKIN DILWORTH JONES,
FRANCIS BACON JAMES,

JONES & JAMES, Attorneys. Counsel for Plaintiff in Error.

(16,330)

BARNHART & SWINDELLS, CINCINNATI.

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EPITOME OF BRIEF.

I.—First Count of Indictment — Questions as to.

(1.) Where a statute, which provides for the punishment of a crime, does not enumerate the facts constituting the crime, an indictment which follows the language of the statute and does not allege the facts constituting the crime, is fatally defective, and a demurrer thereto should be sustained. (*Post*, page 23.)

(2.) Revised Statutes of the United States, Section 3082, provides for the punishment of any person who shall fraudulently or knowingly import, or bring into the United States, merchandise contrary to law. An indictment, which follows the language of the statute, but does not allege facts showing how the importation or bringing in were contrary to law, or what law they were contrary to, is fatally defective, and a demurrer thereto should be sustained. (*Post*, page 32.)

II.—Second Count of Indictment — Questions as to.

(1.) Where a rate of duty is placed on all species of a certain class of goods, under a generic name, and several species thereof are specifically named on the free list, such generic name applies to every specie of that class, except those specified in the free list. While punctuation may be disregarded, it is the duty of the Court to carry out the expressed, and not the unexpressed intention of Congress. A Court can not inject into a statute a provision, because it accords with the settled policy of Congress. In interpreting a tariff law, all doubt must be resolved in favor of the citizen. Taxation can only be imposed by a direct, positive provision of law, and every doubt must be resolved in favor of the citizen. (*Post*, page 26.)

(1a.) The Act of August 27, 1894 (28 Stat., 534), paragraph 338, places a duty on "precious stones," and paragraph 467 places "diamonds" on the free list. An indictment charging the smuggling of diamonds states no crime. (*Post*, page 26.)

(2.) An indictment should directly, expressly, and fully state facts constituting a crime without any uncertainty, ambiguity, and not by conjecture, inference, or implication. If a generic term covers several things, in reference to some of which a crime may be committed, and as to others a crime can not be committed, the indictment shall so particularly describe the same as to specify those as to which a crime may be committed. A mere legal conclusion, in the language of the statute, will not be sufficient. (*Post*, page 26.)

(2a.) If paragraph 338 of the Act of August 27, 1894 (28 Stat., 534), places a duty on "precious stones;" and paragraph 467 places "miners', glaziers', and engravers' diamonds not set," on the free list, an indictment for smuggling is demurrable which merely charges the unlawful bringing in of "diamonds," but must name a kind of diamonds other than those mentioned in the free list. A mere legal conclusion, in the language of the statute, in such indictment, "that they were "goods, wares, and merchandise subject to duty by law" is not such an allegation, because the facts must be stated, so an inspection of the record will show, as a matter of law, that they were subject to duty, and thus amenable to the smuggling law. (*Post*, page 26.)

(3.) Revised Statutes of the United States, Section 1025, does not apply to a case where an indictment charges no crime, or where it omits an allegation of substance, but only where an indictment is defective in a manner of stating some matter of substance. (*Post*, page 27.)

(4.) Where an indictment omits a matter of substance, a demurrer is the proper remedy to raise the question of the insufficiency of the indictment to state a crime, and the defendant is not limited to asking for a Bill of Particulars. To limit the defendant to a Bill of Particulars to be furnished by the District Attorney is to substitute "indictment by District Attorney" for "indictment by Grand Jury." (*Post*, page 27.)

(5.) In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. (*Post*, page 27.)

(5a.) If the word "smuggle" be given either its common law or statutory definition, it is insufficient to allege smuggling in the lan-

guage of the statute, but, by allegations of facts, the elements must be set forth. (*Post*, page 27.)

(5b.) The words "clandestinely introduce" do not of themselves fully, directly, and expressly set forth all the elements necessary to constitute an offense, and the facts must be set forth, and it is insufficient to follow the language of the statute. (*Post*, page 27.)

(5c.) In an indictment for smuggling it is insufficient to merely set forth in the language of the statute, that the "goods, wares, and merchandise should have been invoiced," because under section four of the act of June 10, 1890 (26 U. S. Stat., 131), it is not always necessary to invoice goods, and the indictment ought to have stated facts showing the goods should have been invoiced, and it was insufficient to follow the language of the statute. (*Post*, page 27.)

III. Second Count of Indictment — Erroneous Conviction Under.

(1.) In order to constitute a violation of the Act of February 27, 1877, 19 Stat., 247, amending Rev. Stat., Sec. 2865, the following elements must exist and be established by the evidence: (a) smuggling or clandestinely introducing into the United States, (b) goods, wares, and merchandise, (c) which should have been invoiced, (d) and as to which the invoice is omitted, (e) goods, etc., subject to duty, (f) the duty not having been paid, (g) done knowingly and willfully, and (h) all with intent to defraud the revenue of the United States. (*Post*, pp. 59-60.)

(1a.) If a statute contain a word having a technical meaning, such word shall be given that technical meaning. The word "smuggle" has a well-defined technical meaning, and means bringing on shore or carrying from shore, goods, wares, or merchandise for which duty has not been paid, or goods of which the importation or exportation is prohibited. (*Post*, page 60.)

(1b.) Criminal statutes are to be accurately and strictly construed, and can not be extended by implication to cases not falling within their terms. Words can not be read into a statute or out of a statute, and this rule is peculiarly applicable to penal laws. The Act of June 22, 1874, 18 Stat., 186, Sec. 4, defines "smuggling" for the purposes of that act. Such definition can not be extended by implication to the Act of February 27, 1877, 19 Stat., 247, amending Sec. 2865, Rev. Stat. (*Post*, page 60.)

(1c.) Words of a statute are to be read in connection with those with which they are used. The Act of February 27, 1877, 19 Stat., 247, amending Sec. 2865, Rev. Stat., provides a penalty for importing or clandestinely introducing into the United States goods, etc., subject to duty by law which should have been invoiced and without paying the duty. The obligation to pay duty does not arise until after the importation is complete, and if no overt act can be done after the importation is complete, there is no smuggling or clandestinely introducing into the United States. (*Post*, page 60.)

(1d.) The omission to get a consular invoice for diamonds, a failure to put them on a manifest, the placing them in a state-room of a ship at Liverpool, the arrival of the ship within the port of Philadelphia, the demand on board the ship for the diamonds by a revenue officer, who makes himself known as such, the taking of the diamonds and delivering the same to him, does not constitute smuggling or clandestinely introducing into the United States. (*Post*, page 60.)

(1e.) It is no offense against the Act of February 27, 1877, 19 Stat., 247, amending Sec. 2865, Rev. Stat., when there is no legal obligation to procure an invoice. By Section 4 of the Act of June 10, 1890, 26 Stat., 131, there is no obligation to procure an invoice of personal effects accompanying a passenger, and a Captain of a steamship is a passenger within the meaning of said act, and does not cease to be such by being Captain. Therefore, if the Captain of a steamship smuggles or clandestinely introduces diamonds, without paying duty thereon, he is not guilty of the statutory offense contained in the Act of February 27, 1877, 19 Stat., 247, amending Section 2865, Revised Statutes. (*Post*, page 60.)

(1 f.) The *corpus delicti* must be clearly identified, and without proof of the *corpus delicti* there can be no conviction. If, on a charge of smuggling and clandestinely introducing, a person marks a package in Europe for the purposes of identification, and a package is seized on board a steamship in the port of Philadelphia having no address thereon, there is a failure of proof of the *corpus delicti*, and there can be no conviction. (*Post*, page 60.)

(2.) Revised Statutes, Section 1035, provides that a defendant may be found guilty of an attempt to commit the crime charged, provided such attempt be itself a separate offense. An attempt to smuggle or clandestinely introduce has never been made a separate offense, and there can be no conviction of an attempt. (*Post*, page 60.)

(3.) There is a broad distinction between an intent and an attempt; there is a wider distinction between acts which constitute a preparation, and the after overt acts of an attempt. (*Post*, page 60.)

(3a.) Obtaining diamonds in Europe with the intention of smuggling into America, omitting to get a consular invoice, placing them in a state room on a steamship at Liverpool, omitting them from a ship's manifest, steering the ship into the port at Philadelphia, accompanied with an intention to smuggle, when nothing more is done, while they may constitute the distinct offenses of omitting from the manifest, or importing contrary to law, do not amount to more than overt acts of preparation, and there is no overt act of an attempt to smuggle. (*Post*, page 61.)

(3b.) When such diamonds remained in the state-room of the steamer, where they had been placed at Liverpool, and a revenue officer boards the ship at Philadelphia, and making himself known as such, demands the diamonds, and the Captain goes to the state room, gets the diamonds and delivers them up to the officer, there is no overt act of an attempt to smuggle. (*Post*, page 61.)

IV.—Evidence Erroneously Admitted.

(1.) A person sworn as a witness should be permitted to state only facts to which he was only a percipient witness. If a person claiming to be a percipient witness to facts, declare same to another, the latter, when sworn as a witness, is but a percipient witness to the fact of the declaration, and not to the transaction declared to him. And said declaration is purely hearsay and inadmissible. An exception to this rule arises in cases of declaration made by a conspirator during the continuation of the conspiracy; but declarations made thereafter are hearsay and inadmissible. (*Post*, page 91.)

(1a) When a sea Captain claims that a stranger to him, in Europe, induced him to smuggle diamonds into America, and said sea Captain steamed his vessel into the port of Philadelphia, where the diamonds were seized and the Captain arrested by a revenue officer, and a day after the seizure the Captain gave to the revenue officer a description of the stranger, who, he claims, gave him the diamonds in Europe, but whose name he did not know, it is not competent upon the trial of said stranger on a charge of smuggling for said revenue officer to give testimony as to the description given to him a day after the seizure of the diamonds and the arrest of the captain. Such testimony is

inadmissible, is hearsay, and does not come within the rule of declarations made by a conspirator during the continuation of the conspiracy.

(2) Hearsay evidence is not admissible to corroborate the statements of a witness made upon the stand. (*Post*, page 91.)

(2 a) A Court admitted hearsay evidence. It was all that could be claimed to be corroborative of the evidence of the person claiming to be the only percipient witness to a transaction. The Court charged the jury, that if they believed the statements under oath of said percipient witness, they must find the defendant guilty, and said part of the charge was duly excepted to. When the Court further charged the jury, that the Government claimed that the percipient witness was corroborated in such manner that it was not only safe to believe, but that belief could not be avoided, and that the points of corroboration had been dwelt upon by the District Attorney very fully, and the Court need not further allude to them, such part of the charge is such a plain error, vital to the defendant, that a reviewing Court should correct, although not excepted to, or assigned for error, and makes the incompetent evidence especially prejudicial. (*Post*, page 91.)

(3.) When evidence is being adduced during the progress of a trial, a mere general objection is presumed to be the admissibility of the evidence and not to the competency of the instrument of evidence. Hence, a general objection on the trial will not be considered by a reviewing Court as an objection to the competency of a witness, or that an instrument was not properly authenticated. (*Post*, page 91.)

(3 a) It is a general rule that the ground of an objection to the admissibility of evidence should be stated. The reason of the rule is, that the Court and counsel might not be misled. When the record discloses that the Court is cognizant of the grounds of objection, the reason of the abstract rule ceases and the record sufficiently discloses the grounds of the objection, and it is unnecessary to repeat the same, and the reason of the rule ceases of application to the concrete case. (*Post*, page 91.)

(3 b.) The record discloses that a question was objected to and the objection sustained on the ground that the evidence was hearsay. This was followed by a second question, differing only in verbal expression. This question was similarly objected to without specifically stating the ground of the objection. The Court overruled the objection, and an exception was allowed. In such case it was unnecessary to repeat the ground of the objection, because the Court had stated it, and neither

the Court nor counsel were misled. In such case the reason of the abstract rule ceased, and the rule ceased of application to the concrete case. (*Post*, page 92.)

V.— Evidence Erroneously Excluded.

(1.) In every case the following are pertinent hypotheses: (a) the issue made by the pleadings; (b) the truthfulness of a witness; (c) the accuracy of a witness; (d) the bias of a witness; (e) the probability or improbability of evidence of the witness. It is competent to introduce evidence to prove or disprove any or all of said hypotheses, and such evidence is relevant and admissible, and its weight for the jury. (*Post*, page 106.)

(1 a.) A sea captain testified that while in Europe a stranger procured him to agree to smuggle diamonds into America; that he saw the stranger but fifteen or thirty minutes; that the conversation was carried on in Flemish by a friend of the captain; that the stranger wrote an address on a piece of paper, and that he said, "by Adams Express" in English; that he did not know the stranger by name, and could only identify him by his face; and that he expected to better his condition by testifying that he (the Captain) wrote the address on the package in Europe, although the package seized had no address on it. Said stranger, when on trial charged with said smuggling, denied meeting the Captain, the alleged transaction, and having any conversation with him. Under said circumstances, it is competent for said defendant to offer evidence to show that he dealt wholly in rough diamonds; could not make use of the diamonds in his business, he never handled diamonds of the character alleged to have been smuggled, and had no motive to smuggle. Such evidence is competent in support of the hypothesis that the Captain was mistaken in his identity, biased in his evidence, and that the evidence of the Captain was improbable and that of the defendant probable. It being thus relevant to a pertinent hypothesis, the Court must admit it; its weight is for the jury. (*Post*, pp. 106–107.)

(1 b.) On the trial of the said defendant, the said Captain, a resident of Antwerp, testified that when, on January 27, 1896, the diamonds were handed to him by his friend, the stranger (Mr. Keck) wrote on a piece of paper the name T. Van Reeth, 21 West Fourth Street, Cincinnati, and handed it to him; that he (the Captain) wrote the address on the package in Europe, although the package seized had no address

on it; that he kept said paper in his pocket, and produced it for the first time March 18, 1896; the Captain steamed his vessel into the port of Philadelphia February 11, 1896; was arrested and the diamonds seized. On his arrest, and thereafter, he claimed to have given a full statement of the receipt of the diamonds and the circumstances surrounding same. After his arrest he made a trip to Europe and returned to testify against Mr. Herman Keck, March 18, 1896, when, for the first time, the Captain produced the paper and claimed that it had existed since January 27, 1896. He denied that he knew Franz Van Reeth, but admitted that he might have seen the name and picture of Franz Van Reeth in the Antwerp newspapers, with the statement that Franz Van Reeth had gone to Cincinnati to cut diamonds. Franz Van Reeth, a diamond cutter and former resident of Antwerp, testified that he had known the Captain for twelve years. Mr. Constant Van Reeth, of Antwerp, a son of Franz Van Reeth, was called as a witness. It was offered to prove by him that the newspaper which the Captain stated he read, did contain the name and picture of his father, Franz Van Reeth, together with a statement that his father had gone to Cincinnati to cut diamonds. Such testimony was relevant to the pertinent hypotheses that the witness, Captain Frank Loesewitz, was untruthful, biased in not admitting the whole truth; that the paper was spurious, prepared between the time of his arrest and the time of testifying against Mr. Keck; that the Captain had an opportunity to prepare the same on his revisit to Antwerp between said times and it ought to have been admitted, and it was error for the Court to exclude it. (*Post*, page 107.)

VI.—Charge of Court to Jury — Part Excepted to.

(1.) Where the counts of an indictment omit substantial allegations, and have been duly demurred to, such omissions can not be supplied by a verdict induced by an instruction of the Court. (*Post*, page 124.)

(2.) A charge of a Court to a jury should cover the whole case, and not single out parts of the testimony of one witness. The whole case, on all of the evidence, should be submitted to the jury, and the jury must find from all of the evidence that the defendant is guilty beyond a reasonable doubt, and that the evidence is inconsistent with any reasonable hypothesis of innocence and consistent with every reasonable hypothesis of guilt. (*Post*, page 124.)

(2a.) The defendant was charged with importing contrary to law and with smuggling diamonds. A sea captain, who claimed that the defendant procured him to smuggle the diamonds, was the only percipient witness to the transaction. He testified (a) that a friend in the presence of the defendant gave him the diamonds; (b) that the defendant gave him a slip of paper with the name and address of T. Van Reeth thereon; (c) that he wrote an address on the package; (d) that he had been in the habit of bringing over similar small packages, and always reporting to the revenue officer upon the dock. The Court charged the jury, that if they believed the statements of the Captain, under oath, "respecting his receipt of the package of diamonds in Antwerp and bringing them here," to find the defendant guilty. Such charge is erroneous as not covering the whole case, or the testimony of all the witnesses, or all of the testimony of one witness, and withdraw from the jury certain hypotheses material to the question of guilt. (*Post*, page 124.)

VII.—Answer of Court to Request Number Ten for Special Instruction.

(1.) It is error for a court in answer to a request for a special instruction to affirm the point generally, and at the same time practically withdraw all of the evidence of all of the witnesses from the jury, except two parts of the testimony of one witness.

(1 a) Defendant requested the Court to charge the jury, that a preponderance of the evidence is not sufficient, but that they must find the defendant guilty beyond a reasonable doubt from all of the evidence, and that the evidence must be consistent with hypothesis of guilt and inconsistent with any hypothesis of innocence. The Court answered, affirming the request generally, but gave it the meaning that the jury should find the defendant guilty if they believed the defendant guilty of the smuggling charged as testified to by the prosecuting witness. The effect of such charge is to withdraw from the jury all of the evidence of all of the witnesses, except that of the prosecuting witness, and confine his testimony to so much thereof as pertain to the smuggling charge, as testified to by him, and is error. (*Post*, page 134.)

(1 b.) It is error for a court to instruct the jury to find a defendant guilty generally under an indictment alleging a violation of three provisions of law, if they find the defendant guilty of one provision, which is not sustained by the law and evidence.. (*Post*, p. 134.)

VIII.— Error for Refusing Application for Dedimus.

(1.) It is a maxim that that which is plain is not to be interpreted or construed. When language is plain and unambiguous, a refusal to recognize its natural obvious meaning indicates a purpose to change the law by judicial action, and the courts will refuse to depart from such natural obvious meaning. The Revised Statutes must be treated as a legislative declaration of the statute law on the subjects embraced therein on the first day of December, 1873. When that meaning is plain and unambiguous the courts must adhere to it, and can not resort to extraneous aids. It is a condition precedent to a right to resort to a law repealed by a revision that an ambiguity exists in the law as contained in the evidence. When the meaning of the revision is plain courts can not look to statutes repealed by the revision to see if Congress erred in the revision. (*Post*, page 136.)

(1b.) Revised Statutes of the United States, Section 866, which provides that "any court" of the United States may grant a *dedimus potestatem* in "any case" where it is necessary in order to prevent a failure or delay of justice. The words "any court" and "any case" are plain and unambiguous, and should be given their plain and ordinary meaning. Giving them their plain and ordinary meaning, the words "any court" include a district court, and the words any "case" include a criminal case. Resort can not be had to Section 30 of the Judiciary Act of September 24, 1789, 1 Stat., 90, for the purpose of raising a doubt and then clearing up the doubt by the original statute. (*Post*, page 137.)

(1c.) A person charged with smuggling presented proof in support of an application for a *dedimus* that (a) the prosecuting witness was in the habit and practice of smuggling; (b) that the prosecuting witness had carried a written order to Europe on the business card of a New Jersey merchant for the diamonds which were seized; (c) to show the nature of defendant's business in Europe; (d) that from the amount of the prosecuting witness's income and expenditures, a part of his income was derived from sources other than his wages; (e) record evidence of the prosecuting witness's prosecution for other smuggling transactions; (f) the general bad reputation of the prosecuting witness for truth and veracity. The Court denied the application because the statute did not apply to criminal cases, and that the circumstances did not call for its application at that time; that it did not appear but what witnesses could have been procured; and that the application

came too late, and might have been made months before. The refusal of the Court was erroneous, because it made no finding that it was not necessary to prevent a failure of justice, and the action of the Court was based upon a misapprehension of law and fact. (*Post*, page 137.)

IX.—Sentence Erroneous.

(1.) Revised Statutes of the United States, Section 5541, only authorizes a sentence of imprisonment in the penitentiary within the district or State where the court is held where the sentence is for a period longer than one year. If the sentence be for one year, the Court has no power under said Section 5541. (*Post*, page 147.)

(1 a.) Where a person was indicted and convicted for a violation of Section 2865 and Section 3082 of the Revised Statutes of the United States, for smuggling and importing contrary to law, in the United States District Court for the Eastern District of Pennsylvania, and sentenced for a period of one year, the Court has no power to order his confinement and imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania. (*Post*, page 147.)

(1 b.) Where there is a valid sentence as to a fine, and an invalid sentence as to the imprisonment, and the Court has power to impose fine or imprisonment, the one can be separated from the other, and a reviewing court will affirm as to the fine, issue a mandate to that effect, and declare the imprisonment void. (*Post*, page 147.)

THE UNITED STATES OF AMERICA.

Supreme Court of the United States.

OCTOBER TERM, 1897.

HERMAN KECK, *Plaintiff in Error.*	No. 194.	Oct. Term, 1897.
vs.	No. 551.	Oct. Term, 1896.
THE UNITED STATES, *Defendant in Error.*	(16,330)	

Revised Brief of Plaintiff in Error on Re-Argument.

MAY IT PLEASE THE COURT:

This Court, having entered an order, directing that this cause be reargued, we respectfully submit, on the reargument, the following revised brief on behalf of Mr. Herman Keck, plaintiff in error, to wit:

STATEMENT OF THE CASE.

Action to Reverse.—This is an action (original record, pp. 223–229; printed, pp. 118–120) to reverse the judgment of the District Court of the United States for the Eastern District of Pennsylvania, whereby and wherein Mr. Herman Keck, plaintiff in error, was convicted by a jury (original record, p. 35; printed, p. 12) of a violation of Sections 2865

and 3082 of the Revised Statutes of the United States; and was, by the judgment of the Court, sentenced to pay a fine of $200 and be imprisoned and confined in the Eastern Penitentiary of the Commonwealth of Pennsylvania for a term of one year and pay the costs of prosecution (original record, pp. 45–46; printed, pp. 15–16).

Indictment.—On May 18, 1896, at the May Term, 1896, of the District Court of the United States, for the Eastern District of Pennsylvania, an indictment, containing three counts, was returned against Mr. Herman Keck, plaintiff in error (original record, pp. 3–8; printed, pp. 1–2).

First and Third Counts.—The first count charged him, in the very language of the statute, with importing diamonds contrary to law, contrary to the provisions of Section 3082 of the Revised Statutes of the United States (original record, pp. 3–4; printed, p. 1). The third count, in the same language, charged him with importing diamonds contrary to law, contrary to the provisions of the same section (3082) of the Revised Statutes of the United States, in that he violated the law by concealing diamonds in a small box, contrary to the provisions of Section 2802 of the Revised Statutes of the United States (original record, pp. 6–7; printed, p. 2).

Second Count.—The second count charged him with smuggling diamonds contrary to the provisions of Section 2865 of the Revised Statutes of the United States (original record, pp. 4–6; printed, pp. 1–2).

Application for Dedimus Potestatem.—On the 26th day of May, eight days after the indictment, and the day before he was arraigned, Mr. Herman Keck moved to quash the indictment (original record, pp. 8–12; printed, pp. 3–4). And this motion the Court overruled (original record, p. 13; printed, p. 4). He then demurred to the indictment (original record, pp. 14–17; printed, pp. 5–6). This demurrer the Court overruled (original record, p. 17; printed, p. 6). On the same

day, he filed an application in writing for a dedimus protestatem, to take depositions at Amsterdam, Holland, and Antwerp, Belgium, in pursuance of Section 866 of the Revised Statutes of the United States, because the testimony to be taken was necessary to his defense, and necessary in order to prevent a failure of justice (original record, p. 18; printed, p. 6; original record, p. 47; printed, p. 16). In support thereof he presented an affidavit, setting forth important matters, which would have been clearly material to him in his defense (original record, pp. 19–28; printed, pp. 6–9; original record, pp. 48–54; printed, pp. 17–20). The Court then and there overruled said application; to which ruling of the Court, Herman Keck, plaintiff in error, excepted; which exception was then and there allowed by the Court (original record, p. 54; printed, p. 20), and set forth as number three in the assignment of errors (original record, p. 212; printed, p. 114), and set forth in the petition for a writ of error (original record, pp. 224–225; printed, p. 119). The following day the United States presented an answer to the application for the dedimus protestatem (original record, pp, 28–32; printed, pp. 10–11; original record, pp. 54–58; printed, pp. 20–21). On the same day the Court again refused the application upon two grounds (original record, pp. 33–34; printed, p. 11; original record, p. 57; printed, p. 22), in the following language, to wit:

"First.—That the statute relied upon is not applicable to the criminal court, nor to the trial of causes therein.

"Second.—That if it was, the circumstances shown do not call for its application in this case at this time; that it does not appear that the presence of the witnesses could not have been procured by proper effort, and that if it did appear, it should be held that the application comes too late; that it might have been made months ago and all delay in consequence of granting it avoided."

Mr. Herman Keck, plaintiff in error, duly excepted, which exception was allowed by the Court (original record, p. 34; printed, p. 12). This ruling is assigned as number three in

the assignment of errors (original record, p. 212; printed, p. 114), and is set forth in the petition for a writ of error (original record, pp. 224-225; printed, p. 119).

Third Count of Indictment — Questions as to. — The third count of the indictment can be dismissed from discussion, because the evidence wholly failed to support the same, and the learned trial Court, at the request of Mr. Herman Keck, plaintiff in error, instructed the jury to return a verdict of not guilty thereon (original record, p. 206; printed, p. 111). This leaves for discussion the sufficiency of the first and second counts, the evidence, instructions, charge of court, etc.

First Count of Indictment—Questions as to.—The first count of the indictment was in the very language of the statute, and charged Mr. Herman Keck, plaintiff in error, with importing diamonds contrary to law, contrary to the provisions of Section 3082 of the Revised Statutes of the United States (original record, pp. 3-4; printed, p. 1). It reads as follows:

"The grand inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their respective oaths and affirmation, respectively do present that heretofore, to wit: upon the 11th day of February, in the year of our Lord one thousand eight hundred and ninety, one Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this Court, did knowingly, willfully, and unlawfully, import and bring into the United States, and did assist in importing and bringing into the United States, to wit: into the port of Philadelphia, certain goods, wares, and merchandise, to wit: Five hundred and sixty-three diamonds of great value, to wit: of the value of ten thousand dollars, contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States, contrary to the form of the act of Congress, in such case made and provided, and against the peace and dignity of the United States of America."

On May 26, 1896, Herman Keck, plaintiff in error, moved the Court to quash said count in the indictment for various reasons (original record, pp. 8-13; printed, pp. 3-4), and on the same day the Court overruled the motion (original record,

p. 13; printed, p. 4), and this ruling was assigned for error as number one in the assignment of errors (original record, pp. 211–212; printed, p. 114).

On the same day Mr. Herman Keck, plaintiff in error, demurred to said first count in the indictment, because the matters therein contained, in manner and form, as stated, were not sufficient in law, and that he was not bound by the law of the land to answer the same, and that, for want of sufficiency of the first count of the indictment, he prayed judgment and dismissal (original record, pp. 14–15; printed, p. 5). The Court overruled said demurrer (original record, p. 17; printed, p. 6), which action of the Court Mr. Herman Keck, plaintiff in error, sets forth as his second assignment of error (original record, pp. 211–212; printed, p. 114), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

At the close of all the evidence, Mr. Herman Keck, plaintiff in error, requested the Court to return a verdict of not guilty on the first count of the indictment, because it did not state any crime, and that it should be entirely ignored. The Court refused to give this instruction (original record, p. 206; printed, p. 111). This action of the Court is assigned for error as assignment number fourteen in the assignment of errors (original record, pp. 219–220; printed, p. 117), and set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

Mr. Herman Keck, plaintiff in error, moved the Court in arrest of judgment, among other grounds, for the insufficiency of the first count of the indictment (original record, pp. 41–42; printed, p. 14), which motion the Court overruled (original record, p. 222; printed, p. 118). This ruling is assigned as number nineteen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

Second Count of Indictment — Questions as to.— The second

count of the indictment charged Mr. Herman Keck, plaintiff in error, in the language of the statute, with smuggling diamonds, contrary to the provisions of Section 2865 of the Revised Statutes of the United States (original record, pp. 4–6; printed, pp. 1–2). It reads as follows, to wit:

"And the grand inquest, aforesaid, inquiring, as aforesaid, upon their respective oaths and affirmations, do further present that afterward, to wit: upon the day and year aforesaid, the said Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this Court, did knowingly, willfully, and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to wit: into the port of Philadelphia, certain goods, wares, and merchandise, to wit: five hundred and sixty-three diamonds, of great value, to wit: of the value of ten thousand dollars, without paying and accounting for the duty imposed upon the said goods, wares, and merchandise by the provisions of the act of Congress in such case made and provided, which said goods, wares, and merchandise so smuggled and clandestinely introduced as aforesaid were subject to duty by law, and should have been then and there invoiced, the said Herman Keck then and there well knowing that the duty due and payable upon the said goods, wares, and merchandise had not been paid and accounted for, and that the said goods, wares, and merchandise had not been invoiced, as required by the provisions of the act of Congress in such case made and provided, with intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

Mr. Herman Keck, plaintiff in error, moved the Court to quash this count of the indictment (original record, pp. 10–11; printed, pp. 3–4), which motion the Court overruled (original record, p. 13; printed, p. 4); and this is assigned as number one in the assignment of errors (original record, pp. 211–212; printed, p. 114).

A demurrer was then interposed by Mr. Herman Keck, plaintiff in error, because said second count and the matters therein contained in manner and form, as set forth, were not sufficient in law, and that he was not bound by the law of the

land to answer the same; and for want of sufficiency of the second count he prayed judgment and a dismissal (original record, p. 15; printed, p. 5). Said demurrer was as follows, to wit:

"And again now comes defendant, Herman Keck, in his own proper person, into court, and having heard the said indictment, and the second count thereof read, says that the said second count of said indictment and the matters therein contained, in manner and form, as the same are above stated and set forth, are not sufficient in law, and that he, the said Herman Keck, is not bound by the law of the land to answer the same; and this he is ready to verify, wherefore, for want of sufficiency of the second count of said indictment in this behalf, the said Herman Keck prays judgment, and that by the Court he may be dismissed and discharged from the said premises in the said second count of said indictment specified."

The Court overruled said demurrer (original record, p. 17; printed, p. 6). The overruling of said demurrer is assigned for error as assignment number two in the assignment of errors (original record, p. 212; printed, p. 114), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

Mr. Herman Keck, plaintiff in error, moved in arrest of judgment because of the insufficiency of the second count in the indictment, original record, p. 36; printed, p. 12), and the Court overruled said motion in arrest of judgment (original record, p. 45; printed, p. 15). This was assigned for error as number nineteen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for a writ of error (original record, p. 227; printed, p. 120).

Evidence Erroneously Admitted and Excluded.—There were several errors assigned for the wrongful admission and exclusion of evidence, as follows, to wit:

FIRST.—The United States, to maintain the issues on its part, called, among other witnesses, Captain Frank Loesewitz (original record, p. 59; printed, p. 22).

As appears from the Bill of Exceptions, the story as told by

him is substantially as follows: That he was a native, citizen, and resident of Antwerp, Belgium; by occupation a seafaring man and captain of the steamer Rhynland, plying between Philadelphia and Liverpool. On the 27th day of January, 1896, witness made a social call at the residence and place of business of Mr. Van Hammelrick, in Antwerp, Belgium; Van Hammelrick being a friend of twenty-five years' standing, and the owner of a jewelry store. Just as witness was leaving, Mr. Van Hammelrick came in with a person whom the witness indentified in court as Mr. Herman Keck, the plaintiff in error, and Mr. Van Hammelrick invited witness to go and have a glass of beer. The strange person was introduced, but his name was not given. The three went to the Café Alsacienne, on the Place Verte, sat down at a table, and each ordered a glass of beer. The place was crowded, and there were thirty or forty people about. Mr. Van Hammelrick spoke in Flemish. While they were sitting there Mr. Van Hammelrick took a small package from his pocket, showed it to witness, and said, "This package belongs to that person here," and Van Hammelrick further said to witness, "Will you oblige me to take that over to America? It belongs to him; it belongs to that gentleman; he's a customer of mine; it does not contain any valuables." Witness asked the stranger, "Where shall I send it to?" The stranger tore a piece of paper off a card lying on the table and put an address on it. The name on it was T. Van Reeth, Fourth Street, Cincinnati—either No. 21 or 24, and witness thought 21. Witness put the package and paper in his pocket, and after being at the cafe a quarter of an hour, the three separated on Place Verte, where Mr. Keck told witness to send the package by Adams Express. Witness sailed from Liverpool on January 29, and put the package in his state-room and the paper in a card case in his pocket. Witness never put the package and slip of paper with address on it together (original record, p. 78; printed, p. 34), but wrote the address on package

himself (original record, p. 78; printed, p. 34), although package seized by officer had no address on it. When the Rhynland reached the port of Philadelphia the following took place, as testified to by the witness Captain Frank Loesewitz (original record, p. 66; printed, p. 27).

"Two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, yes. I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were Treasury agents, and said, Captain, that is a package of diamonds you have got, to to be sent to Cincinnati, and if I didn't deliver it I would be arrested. After a while I went down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened."

The witness further testified (original record, pp. 81–82; printed, pp. 36–37) that he had been in the habit of bringing over small packages in the same way he brought this package, and that after the vessel had been docked, he would go to a custom officer on the dock and report the fact. In this case he had not had time to go on the dock, as the Treasury agents came aboard before he had time to go upon the dock.

The witness further testified (original record, p. 82; printed, p. 37) that he had never heard of Mr. Keck, did not recall his name, and the first time he knew his name was when Mr. Gallen, the Treasury officer, came on board of the ship. The witness testified that he had no recollection of the name "Keck," and if Mr. Gallen had said "Johnson," witness would not have known the difference, and all witness knew was the man's face, and that he could not identify him by his name at all, but by his face.

The following illustrates a part of this testimony:

Q. "You did not identify him by his name at all, did you?"

A. "No, not by his name. I identified him by his face."

Herman Keck, plaintiff in error, did not sail on the "Rhyn-

land," was never on the "Rhynland," and was not at Philadelphia. Herman Keck, the plaintiff in error, arrived in New York from Europe on the steamer "Aller," at Hoboken, New Jersey, about the 14th of February, 1896.

Herman Keck's testimony is a direct and categorical denial of the testimony of Captain Frank Loesewitz.

The United States, to further maintain the issue upon its part, called as a witness Mr. John C. Gallen (original record, p. 92; printed, p. 43).

Among the questions asked by the United States District Attorney and objected to by Mr. Herman Keck, plaintiff in error, which objection being overruled by the Court, he then and there excepted (original record, pp. 97-98; printed, p. 46), was the following, to wit:

Q. "Did the Captain give you a description of the man who gave the diamonds to him?"
(Objected to. Objection overruled. Exception allowed for defendant.)
A. "Yes, sir."
Q. "What was the day when he gave you the description?"
A. "The day after I seized the diamonds."

This action of the Court was assigned for error as number five in the assignment of errors (original record, p. 213; printed, p. 114).

SECOND.—There was a direct conflict between the testimony of Captain Frank Loesewitz and Mr. Herman Keck, the plaintiff in error, and when Mr. Franz Van Reeth was upon the witness stand he was asked certain questions, which were ruled out by the Court. Mr. Franz Van Reeth was manager of the Coetermans-Henrichs-Keck Diamond Cutting Company, of which Mr. Herman Keck was President. The following testimony was offered on behalf of Mr. Herman Keck, plaintiff in error, as relevant, as making probable the testimony of Mr. Herman Keck, and improbable the testimony of Captain Frank Loesewitz (original record, p. 175; printed, p. 93), to wit:

Q. "What kind of stones are imported by your firm, cut diamonds or rough?"

A. "Rough."

Q. "What do you do with the rough?"

(Objected to.)

Mr. Shields: "My purpose is to show that they deal wholly in rough diamonds, that they can not make any use of the cut diamonds in their business, and to follow that up by the people who handle their goods and the people who have seen them; that they never have any of this kind of material in their place at all, so as to show there was no motive on the part of these gentlemen to smuggle this stuff in."

(Objected to. Objection sustained. Exception allowed for defendant.)

This ruling of the Court is assigned for error as exception number nine in the assignment of errors (original record, pp. 215–216; printed, pp. 115–116), and is set forth in the petition for writ of error (original record, pp. 225–226; printed, p. 119).

THIRD.— The witness, Captain Loesewitz, called on behalf of the United States, testified that when Mr. Van Hammelrick gave him the package of diamonds, the stranger, whom he identified as Mr. Keck, gave him the slip of paper with the name of T. Van Reeth upon it (original record, p. 62; printed, pp. 24–25), that he did not know Mr. Van Reeth, and that he may have heard the name Van Reeth, may have read the newspapers and seen the name Van Reeth therein. When shown a newspaper with Mr. Van Reeth's picture therein, witness testified that he may have seen it, but did not recollect. The piece of paper upon which Captain Loesewitz testified the stranger had written the name Van Reeth was not produced or spoken of by Captain Loesewitz at his arrest, February 11, at his hearing, February 12, or at any time at any conversation, and was produced for the first time March 18, at the hearing of Mr. Keck before Commissioner Bell. This is testified to by Mr. Gallen, a witness called by the United States (original record, p. 107; printed, p. 52; eleventh line from the bottom).

Mr. Herman Keck, plaintiff in error, produced, among other witnesses, Constant Van Reeth. Among other things

he was asked in reference to his father, as follows (original record, p. 161; printed, p. 84), to wit:

Q. "Was his name mentioned in the papers at the time he left?"

A. (Objected to.)

Mr. Shields: I offer to prove that at least one year, and during a period of one year, prior to the 27th day of January, 1896, the name of F. Van Reeth frequently appeared in the public prints of Antwerp, referred to by Captain Loesewitz in his testimony, and that it was well known through the public prints, and by the knowledge that the people of Antwerp had, that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business.

(Objected to; objection sustained; exception allowed for defendant.)

This ruling of the Court is assigned as number eight in the assignment of errors (original record, pp. 214-215; printed, p. 115).

This testimony was material because Captain Frank Loesewitz, a witness for the United States, testified that he did not know Franz Van Reeth (original record, p. 84; printed, p. 38); and Mr. Franz Van Reeth, a witness for Mr. Herman Keck, testified that he knew Captain Loesewitz (original record, p. 174; printed, p. 92).

General Charge of Court—Exception to.—The story told by Captain Frank Loesewitz on the witness stand has been given substantially (this brief, pp. 7-8), and in reference to the same the Court charged the jury, as follows (original record, p. 208; printed, 112), to wit:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To that much of the charge Mr. Herman Keck, plaintiff in error, the jury being then and there at the bar of the Court, then and there excepted, which exception was then and there duly allowed by the Court (original record, pp. 209-210;

printed, p. 113), and the same appears as assignment number seventeen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for a writ of error (original record, pp. 226–227; printed, p. 120).

Special Instructions—Refusal of.—Mr. Herman Keck, plaintiff in error, requested the Court to give certain special instructions, which were refused. They were as follows, to wit:

No. 1. The first request made was for a binding instruction to find the defendant not guilty (original record, p. 204; printed, p. 110). This was refused by the Court, and to which refusal an exception was taken (original record, p. 208; printed, p. 112), and was assigned as number ten in the assignment of errors (original record, pp. 216–217; printed, 116).

No. 2. The second request was for a binding instruction to find the defendant not guilty on the first count of the indictment (original record, p. 204; printed, p. 110). This was refused by the Court and an exception noted (original record, p. 208; printed, p. 112), and duly assigned for error as assignment number eleven in the assignment of errors (original record, p. 217; printed, p. 116), and is set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

No. 3. The Court disallowed the third request, but rendered its refusal non prejudicial when it allowed request number seven, which finally disposed of and took the third count of the indictment out of the case (original record, p. 205; printed, p. 110; original record, p. 206; printed, p. 111).

No. 4. The fourth request was for a binding instruction that there was insufficient evidence to make out a case against the defendant, Mr. Herman Keck, upon the second count, and that the jury should find him not guilty upon that count (original record, p. 205; printed, p. 110), which was disallowed by the Court and an exception taken (original record, p. 208; printed, p. 112), and is assigned as number twelve in the assignment of errors (original record, pp. 217–218; printed,

p. 116), and in the petition for a writ of error (original record, p. 226; printed, 119).

No. 5. The fifth request for a special instruction to the jury was as follows (original record, p. 205; printed, p. 110), to wit:

"The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that, although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same or putting the same on his manifest, and delivering same in America, without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen, said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged, your verdict must be not guilty."

The Court refused to give this instruction, to which an exception was duly taken (original record, p. 208; printed, p. 112), and the same was assigned as number thirteen in the assignment of errors (original record, pp. 218–219; printed, p. 116), and is set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

No. 6. The Court was requested to give a sixth instruction, to ignore the first count, and this has been heretofore set forth (this brief, p. 5; lines, 17–26) in reference to the indictment (original record, p. 206; printed, p. 111). The request was refused by the Court and an exception noted (original record, p. 208; printed, p. 112), and is set forth as assignment number fourteen in the assignment of errors (original record, pp. 219–220; printed, p. 117), and set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

No. 7. The Court granted the seventh request, and thus disposed of the third count in the indictment (original record, p. 206; printed, p. 111).

No. 8. The Court was requested to give an eighth instruction (original record, p. 206; printed, p. 111), which the Court refused to give, and an exception was noted (original record, p. 208; printed, p. 112), and appears as assignment number fifteen in the assignment of errors (original record, p. 220; printed, p. 117).

No. 9. The Conrt gave the ninth request (original record, p. 207; printed, p. 111).

No. 10. Upon the matter of the burden and degree of proof, the Court, in its general charge to the jury, stated as follows (original record, p. 209; printed, p. 113), to wit:

"Now, from a very careful examination of all the testimony heard on both sides, you must determine whether the defendant is guilty or not. If such an examination does not satisfy you beyond a reasonable doubt of the defendant's guilt, you must acquit him. If it does so fully satisfy you of his guilt, you should convict him."

Upon this subject Mr. Herman Keck, plaintiff in error, requested the Court to give the following instruction to the jury (original record, p. 207; printed, pp. 111–112), to wit:

"No. 10. The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt. A preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt, from the evidence, that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence."

The Court answered this request as follows (original record, p. 207; printed, p. 112), to wit:

"The Court affirms the tenth point generally, but the meaning ascribed to it by the Court is, that the jury shall be fully convinced, from a careful examination of all the testimony

heard, that the defendant *is guilty of the smuggling charged, as testified to, by Captain Loesewitz*, and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilty generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal, and should be acquitted."

Mr. Herman Keck, plaintiff in error, duly excepted to the answer of the learned Court, to the request for said instruction number ten (original record, p. 208; printed, p. 112), and the ruling of the Court was duly assigned as error number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117).

Assignment of Errors.

(Original record, pp. 211–222; printed, pp. 114–118).

Now comes the defendant, Herman Keck, in this action,—in connection with his petition for a writ of error—makes the following assignment of errors, which he avers occurred upon trial of the cause, to wit:

First.—The Court erred in overruling the motion of the defendant, Herman Keck, to quash each and all of the counts in the bill of *of* indictment; to the overruling of which motion the defendant, Herman Keck, then and there excepted; which exception was duly allowed by the Court.

Second.—The Court erred in overruling the demurrer of the defendant in each and all of the counts of the bill of indictment; to which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there allowed by the Court.

Third.—The Court erred in overruling and denying the application of the defendant, Herman Keck, for a *dedimus potestatem* to take evidence in pursuance of Section 866 of the Revised Statutes of the United States, which evidence was necessary to prevent a failure and delay of justice, and which evidence was to be obtained from witnesses in Antwerp, Belgium, and Amsterdam, Holland; to which ruling of the

Court *and* overruling *of* said application, defendant, Herman Keck, then and there excepted, and which exception was duly allowed by the Court.

Fourth. — The Court erred in sustaining the objection to and overruling the following questions asked by counsel for defendant, Herman Keck, of the *of the* witness Frank Loesewitz, first produced by the Government, to wit:

Q. "Wasn't she (the Concha) seized for having on board smuggled goods? Weren't smuggled goods found right next to your cabin?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Fifth.—The Court erred in overruling the objection made by counsel for defendant, Herman Keck, to the following question asked by the District Attorney of the Government witness, John C. Gallen, on direct examination:

Q. "Did the captain give you a description of the man who gave the diamonds to him?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there allowed by the Court.

Sixth.—The Court erred in overruling the objection made by the counsel for the defendant, Herman Keck, to the following questions asked by the District Attorney of the Government witness, John C. Gallen, on direct examination:

Q. "I want to ask you whether it was possible for him, Keck, to have seen that there was no address on that package at the time?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there dully allowed by the Court.

Seventh. — The Court erred in overruling the objection made by counsel for defendant, Herman Keck, to the follow-

ing question asked by the District Attorney of the Government witness, John C. Gallen, on direct examination:

Q. "Was the package held by you at that time so that Keck could see it?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Eighth.—The Court erred in sustaining the objection of the United States District Attorney to the following question put to the witness Constant Van Reeth, a witness for the defendant, Herman Keck, to wit:

Q. "Was his name mentioned in the papers at the time he left?"

To which ruling of the Court, defendant, Herman Keck, then and there excepted; which exception was duly allowed by the Court; and thereupon defendant, Herman Keck, through Mr. Shields, of his counsel, offered to prove as follows, to wit:

"I offer to prove that at least one year and during a period of one year prior to the 27th day of January, 1896, the name of F. Van Reeth frequently appeared in the public prints of Antwerp, and referred to by Captain Loesewitz in his testimony, and that it was well-known through the public prints and by the knowledge that the people of Antwerp had that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business."

And then and thereupon United States District Attorney objected to said offer of proof; which objection the Court sustained, and to which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was duly allowed by the Court.

Ninth.—The Court erred in sustaining the objection of the District Attorney to the following question put by counsel for defendant, Herman Keck, on the direct examination of Franz Van Reeth:

Q. "What do you do with the rough?"

To which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court, and then and thereupon Mr. Shields, of counsel for defendant, Herman Keck, made the following offer of proof, to wit:

"My purpose is to show that they deal wholly in rough diamonds; that they can not make use of the cut diamonds in their business, and to follow that up by the people who handle their goods and by the people who have them, that they never had any of this kind of material in their place at all, so as to show that there was no motive on the part of these gentlemen to smuggle this stuff in."

Then and thereupon the District Attorney objected to said offer of proof; which objection the Court sustained, and then and thereupon the defendant, Herman Keck, excepted; which exception was duly allowed by the Court.

Tenth.—The Court erred in making the charge to the jury in refusing to state to said jury and give it the following instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence introduced in this case to make out the charges against the defendant, Herman Keck, and they are therefore instructed to return a verdict of not guilty on the bill of indictment."

To which refusal so to instruct, the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Eleventh.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the first count of the bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the first count of the bill of indictment."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Twelfth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the second count of the bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the second count of the bill of indictment."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Thirteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same or putting the same on his manifest and delivering the same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged your verdict must be not guilty."

To which refusal to so instruct, the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Fourteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that, as the first count in the bill of indictment insufficiently states any crime against the laws of the United States, said first count in the bill of indictment is to be entirely ignored by them and not considered."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Fifteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that the second count in the bill of indictment charges that the defendant, Herman Keck, smuggled and clandestinely introduced into the United States the diamonds mentioned in the indictment, but does not charge him with aiding and abetting therein, and as the section of the Statutes upon which this count is based makes a distinction between the doing of an act and aiding and abetting therein and therefor, your verdict must be not guilty upon the second count of the bill of indictment."

To which refusal to so instruct, the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Sixteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by defendant, Herman Keck, to wit:

"The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt; a preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt from the evidence that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted, which exception was then and there duly allowed by the Court, and the Court thereupon said it would affirm the point generally and would give a modification of said instruction so requested, and defendant, Herman Keck, thereupon requested the Court to give said instruction as asked, which request the Court refused, and to which refusal and ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Seventeenth.—The Court erred in charging the jury, among other things, as follows, to wit:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To which portion of said charge defendant, Herman Keck, then and there excepted while the jury was still at the bar of the Court.

Eighteenth.—The Court erred in overruling the motion of defendant, Herman Keck, to grant him a new trial; to which ruling of the Court, defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Nineteenth.—The Court erred in overruling the motion in arrest of judgment of defendant, Herman Keck; to which ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

ARGUMENT.

I.

First Count of Indictment—Questions as to.

(1.) Where a statute, which provides for the punishment of a crime, does not enumerate the facts constituting the crime, an indictment which follows the language of the statute and does not allege the facts constituting the crime, is fatally defective, and a demurrer thereto should be sustained.

(2.) Revised Statutes of the United States, Section 3082, provides for the punishment of any person who shall fraudulently or knowingly import, or bring into the United States, merchandise contrary to law. An indictment which follows the language of the statute, but does not allege facts showing how the importation or bringing in were contrary to law, or what law they were contrary to, is fatally defective, and a demurrer thereto should be sustained.

The first count in the indictment is as follows (original record, pp. 3–4; printed, p. 1), to wit:

"The grand inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their respective oaths and affirmations, respectively do present that heretofore, to wit: upon the 11th day of February, in the year of our Lord one thousand eight hundred and ninety, one Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this Court, did knowingly, willfully, and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit: Into the port of Philadelphia, certain goods, wares, and merchandise, to wit: Five hundred and sixty-three diamonds of great value, to wit: of the value of ten thousand dollars, contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

It is based upon the following section of the Revised Statutes of the United States, to wit:

"Section 3082. If any person shall fraudulently or knowingly import, or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation,

knowing the same to have been imported contrary to law, such merchandise shall be forfeited, and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

The count was confined to the first paragraph of said section, which is in the following language, to wit:

"SECTION 3082. If any person shall fraudulently or knowingly import, or bring into the United States, or assist in so doing, any merchandise contrary to law," etc.

Said first count in no manner stated how the importation and bringing in, were contrary to law, or what law they were contrary to, but merely alleged the legal conclusion, in the language of the statute, that they were contrary to law.

It is an elementary rule of criminal pleading, that the defendant should be apprised of the nature of the crime with which he is charged. If, in the case of a statutory crime, the legislative enactment sets forth the facts constituting the offense, it is sufficient if the indictment follow the language of the statute. But when the statute does not set forth the facts constituting the crime, it is not sufficient to repeat the language of the statute in the indictment, but the facts must be alleged. The first count of the indictment is absolutely barren of facts as to how and in what manner the alleged importation and bringing in were contrary to law, or as to what law they were contrary to.

Indictments under the same section (3082) similarly drawn were condemned in the cases of *United States vs. Kee Ho*, 33 Federal Reported, 333 (1887); *United States vs. Claflin*, 13 Blatchford, 178 (1875), and *United States vs. Thomas*, 4 Benedict, 370, 375; S. C. 2 Abbott, 114 (1870). The Supreme Court of the United States applied the same rule under

another statute in the case of the *United States vs. Simmons*, 96 U. S. (6 Otto), 360 (1877). Mr. Justice Harlan, in delivering the opinion of the Court, said, among other things (at page 362), that:

"Where the offense is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.' 1 Bishop Crim. Proc., Sec. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute."

This Court has applied the same rule in *United States vs. Cruikshank*, 92 U. S., 542, 557 (1875); *United States vs. Mann*, 95 U. S., 580 (1877); *United States vs. Simmons*, 96 U. S., 360, 362–363 (1877); *United States vs. Carll*, 105 U. S., 611 (Mr. Justice Gray, at pp. 612–613) (1881); *United States vs. Hess*, 124 U. S., 483 (Mr. Justice Field, at pp. 486–487) (1888); *Pettibone vs. United States*, 148 U. S., 197 (Mr. Chief Justice Fuller, at p. 202) (1892); *Blitz vs. United States*, 153 U. S., 308 (Mr. Justice Harlan, at p. 315) (1893).

The same doctrine has been announced in other cases, such as *State vs. Krueger*, 35 South-Western Reporter, 604, decided by the Supreme Court of Missouri, May 12, 1896.

On the former argument of the case the learned Assistant Attorney-General conceded that this count was demurrable.

Mr. Herman Keck, plaintiff in error, persistently objected to this count of the indictment by moving to quash (original record, pp. 8–10; printed, p. 3); demurring (original record, pp. 14–15; printed, p. 5); asking for a binding instruction to disregard it (original record, p. 201; printed, p. 109), and moving in arrest of judgment (original record, p. 39; printed,

p. 14). The rulings of the Court in denying all of these are assigned as number one (original record, pp. 211–212; printed, p. 114); two (original record, p. 212; printed, p. 114); fourteen (original record, pp. 219–220; printed, p. 117), and nineteen (original record, p. 222; printed, p. 118), in the assignment of errors. It is also set forth in the petition for a writ of error (original record, pp. 226–227; printed, pp. 119–120). These errors have been heretofore enumerated in the statement of the case (this brief, pp. 4–5).

II.

Second Count of Indictment—Questions as to.

(1.) Where a rate of duty is placed on all specie of a certain class of goods, under a generic name, and several specie thereof are specifically named on the free list, such generic name applies to every specie of that class except those specified in the free list. While punctuation may be disregarded, it is the duty of the Court to carry out the expressed, and not the unexpressed, intention of Congress. A court can not inject into a statute a provision, because it accords with the settled policy of Congress. In interpretating a tariff law, all doubt must be resolved in favor of the citizen. Taxation can only be imposed by a direct, positive provision of law, and every doubt must be resolved in favor of the citizen.

(1a.) The act of August 27, 1894 (28 Stat. 534), paragraph 338, places a duty on "precious stones" and paragraph 467 places "diamonds" on the free list. An indictment charging the smuggling of diamonds states no crime.

(2.) An indictment should directly, expressly, and fully state facts constituting a crime without any uncertainty, ambiguity, and not by conjecture, inference, or implication. If a generic term covers several things, in reference to some of which a crime may be committed, and as to others a crime can not be committed, the indictment shall so particularly describe the same as to specify those as to which a crime may be committed. A mere legal conclusion, in the language of the statute, will not be sufficient.

(2a.) If paragraph 338 of the Act of August 27, 1894 (28 Stat. 534), places a duty on "precious stones;" and paragraph 467 places "miners', glaziers', and engravers' diamonds not set," on the free list, an indictment for smuggling is demurrable which merely charges the unlawful bringing in of "diamonds", but must name a kind of diamonds other than those mentioned in the free list. A mere legal conclusion, in the language of the statute, in such indictment, that they were "goods, wares, and merchandise subject to duty by law" is not such an allegation, because the facts must be stated, so an inspection of the record will show, as a matter of law, that they were subject to duty and thus amenable to the smuggling law.

(3.) Revised Statutes of the United States, Sec. 1025, does not apply to a case where an indictment charges no crime or where it omits an allegation of substance, but only where an indictment is defective inia manner of stating some matter of substance.

(4.) Where an indictment omits a matter of substance, a demurrer is the proper remedy to raise the question of the insufficiency of the indictment to state a crime, and the defendant is not limited to asking for a Bill of Particulars. To limit the defendant to a Bill of Particulars to be furnished by the District Attorney is to susbtitute "indictment by District Attorney" for "indictment by Grand Jury."

(5.) In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitue the offense intended to be punished.

(5a.) If the word "smuggle" be given either its common law or statutory definition, it is insufficient to allege smuggling in the language of the statute, but, by allegations of facts, the elements must be set forth.

(5b.) The words "clandestinely introduce" do not of themselves fully, directly, and expressly set forth all the elements necessary to constitute an offense, and the facts must be set forth, and it is insufficient to follow the language of the statute.

(5c.) In an indictment for smuggling it is insufficient to merely set forth in the language of the statute, that the "goods, wares, and merchandise should have been invoiced," because, under section four of the act of June 10, 1890 (26 U. S. Stat. 131), it is not always necessary to invoice goods, and the indictment ought to have stated facts showing the goods should have been invoiced, and it was insufficient to follow the language of the statute.

The second count of the indictment charges no crime. Said second count of the indictment is as follows (original record, pp. 4–6; printed, 1–2) to wit:

"And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations, do further present that afterwards, to wit: Upon the day and year aforesaid, the said Herman Keck, late of the District aforesaid, yeoman, at the District aforesaid, and within the jurisdiction of this court, did knowingly, willfully and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to wit: Into the Port of Philadelphia, certain goods, wares and merchandise, to wit: Five hundred and sixty-three diamonds of great value, to wit: Of the value of Ten Thousand Dollars, without paying and accounting for the duty imposed upon the said goods, wares and merchandise by the provisions of the act of Congress in such case made and provided, which said goods, wares, and merchandise so smuggled and

clandestinely introduced, as aforesaid, were subject to duty by law, and should have been then and there invoiced, the said Herman Keck then and there well knowing that the duty due and payable upon the said goods, wares and merchandise had not been paid and accounted for, and that the said goods, wares and merchandise had not been invoiced as required by the provisions of the act of Congress in such case made and provided, with the intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case as made and provided, and against the peace and dignity of the United States of America."

This count of the indictment was duly demurred to (original record, p. 15; printed, p. 5) in the following language:

"And again now comes defendant, Herman Keck, in his own proper person, into court, and having heard the said indictment and the second count thereof read, says that the said second count of said indictment and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that he, the said Herman Keck, is not bound by the law of the land to answer the same; and this he is ready to verify. Wherefore for want of sufficiency of the second count of said indictment in this behalf, the said Herman Keck prays judgment, and that by the Court he may be dismissed and discharged from the said premises in the said second count of said indictment specified."

The Court overruled said demurrer (original record, p. 17; printed, p. 6).

This action of the court is assigned as number two in the assignment of errors (original record, p. 212; printed, p. 114).

This count of the indictment is based upon the provisions of the Act of February 27th, 1877, 19 U. S. Statutes at Large, Chapter 69, page 247, amending Section 2865 of the Rev. Stat. of the United States, to wit:

"If any person shall knowingly, and willfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass or attempt to pass through the custom house any false, forged or fraudulent invoice, every such person, his, her or their aiders or abettors, shall

be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court."

This count of the indictment does not state a crime, for one or all of five reasons: *First*, diamonds are on the free list; *Second*, if all diamonds be not on the free list, as some diamonds are undoubtedly on the free list, the indictment should have named diamonds which are subject to duty; *Third*, in the charge as to "smuggling" the indictment should have alleged the facts; *Fourth*, in the charge as to "clandestinely introducing," the indictment should have stated the facts; *Fifth*, no facts are stated showing that the diamonds ought to have been "invoiced."

First. Diamonds are on the free list. The act of August 27, 1894 (28 U. S. Statutes at Large, Chapter 349, pp. 509–571), is entitled, "An act to reduce taxation, to produce revenue for the Government, and for other purposes."

The first section reads as follows, to wit:

"That on and after the first day of August, 1894, unless otherwise specifically provided for in this act, there shall be levied, collected, and paid upon all articles imported from foreign countries, or withdrawn for consumption, *and mentioned in the schedules herein contained*, the rates of duty, which are by the *schedules and paragraphs respectively prescribed*, namely:—"

Under "Schedule N—Sundries"—division entitled, "Jewelry and Precious Stones"—is found the following paragraph (p. 534), to wit:

"338. Precious stones of all kind, cut, but not set, twenty-five percentum *ad valorum;* if set and not specially provided for in this act, including pearls set, thirty percentum *ad valorum;* imitations of precious stones, not exceeding an inch in dimensions, not set, ten percentum *ad valorum.* And on uncut precious stones of all kinds ten per centum *ad valorum.*"

If this were the only schedule and paragraph of the tariff law, it is clear that diamonds would fall under the generic

term of "Precious Stones." But under the title of the "Free List" is found the following schedule (p. 539), to wit:

"467. Diamonds; miners,' glaziers,' and engravers' diamonds not set, and diamond dust or bort, and jewels to be used in the manufacture of watches or clocks."

This specific provision takes diamonds out of the general class of precious stones, and makes them non-dutiable. *Arthur vs. Rheims*, 96 U. S., 143 (1877); *Arthur vs. Lahey*, 96 U. S., 112 (1877). While the punctuation, in the use of a semicolon, may be disregarded, it is the duty of the Court to carry out the expressed and not the unexpressed intention of Congress. It is a rule of interpretation, that you are to ascertain not what a legislative body meant, but what it meant by what it said. *United States vs. Schilling*, 11 U. S. App., 603 (1892). A court can not inject into a statute a provision because it is the Court's belief that such provision accords with the settled policy of Congress. *Bate Refrigerating Co. vs. Sulzberger*, 157 U. S., 1 (1894). If we were to concede, for the sake of argument, that a case of doubt arose, such doubt must be resolved in favor of the citizen whose property is to be taxed. Taxation can only be imposed by direct and positive provision of law, and not by implication, construction, or conjecture. Every doubt must be resolved in favor of the citizen. *American Net and Twine Co. vs. Worthington*, 141 U. S., 468 (1891); *Henderson vs. United States*, 66 Fed. Rep., 53, 56 (1895); *Hartranft vs. Wiegmann*, 121 U. S., 609 (1876); *United States vs. Isham*, 17 Wallace, 496, 504 (1873); *Powers vs. Barney*, 5 Blatchford, 202 (1863); *United States vs. Wigglesworth*, 2 Storey, 369, 373–374 (1842); *Adams vs. Bancroft*, 3 Sumner, 384, 387 (1838).

The Board of General Appraisers accepted the above construction and held all diamonds to be upon the free list. This finding was reversed in the case of the *United States vs. Frankel*, 68 Fed. Rep., 186 (1895). Judge Townsend, who delivered the opinion, based his conclusions upon the prem-

ises that the word "diamonds" was a sub-heading. This might be sound, if nothing but diamonds were found within the language of paragraph 467. But in addition to diamonds we find four other articles included, to wit, diamond dust, diamond bort, jewels to be used in the manufacture of watches, jewels to be used in the manufacture of clocks. While diamond dust and diamond bort are chemically of the same substance as diamonds, they are no more diamonds than is coal. Jewels are not necessarily diamonds, and diamond jewels are never used in the manufacture of clocks, and seldom in the manufacture of watches. This seems to clearly demonstrate the fallacy in the premises assumed by the learned judge deciding the *Frankel Case*. The Court further reasoned that the word "diamonds" must be a sub-heading, otherwise it would not have been followed by the words "miners,' glaziers,' and engravers' diamonds not set." This conclusion does not follow, because if the word "diamonds" made all diamonds free it would include both set and unset. So as to tax *set* miners,' glaziers,' and engravers' diamonds, the natural way so to do was to follow the generic term "diamonds" with the words "miners,' glaziers,' and engravers' diamonds not set," and thereby take out of the free list *set* miners,' glaziers,' and engravers' diamonds.

Second. If all diamonds be not on the free list, as some diamonds are undoubtedly on the free list, the indictment should have fully, directly, and expressly named diamonds which are the subject of duty.

It is an elementary rule of criminal pleading that an indictment must by facts fully, directly and expressly, without any uncertainty and ambiguity, and not by implication, intendment, or inference, charge a crime. *United States vs. Cruikshank*, 92 U. S. 542; S. C. Beale's Cases on Criminal Law, 28 (1875); *United States vs. Mann*, 95 U. S., 580. 585 (1877); *United States vs. Simmons*, 96 U. S., 360, 362 (1877); *United States vs. Carll*, 105 U. S. 611, 612–613 (1881); *United States*

vs. Hess, 124 U. S. 483, 486–487, 487 (1888); *Pettibone vs. United States*, 148 U. S. 197, 202 (1892); *Blitz vs. United States*, 153 U. S. 308, 315 (1893); *Commonwealth vs. Newbury Port Bridge*, 9 Pick. 142 (1829); S. C. Beale's Cases on Criminal Law, 37; *State vs. Brown*, 3 Murphy (N. C.) 224, 225 (1819); S. C. Beale's Cases on Criminal Law, 19.

By paragraph 338 of the act of August 27, 1894, 28 U. S. Stat. at Large, 509, there are three specific rates of duty imposed upon *genuine* precious stones, depending upon their character, and a fourth rate of duty upon imitations of precious stones.

As recognized by the world, diamonds have been named and are known by specific designations, such as miners' diamonds, glaziers' diamonds, engravers' diamonds, brilliant diamonds, rose diamonds, briolette diamonds, table diamonds, engraved diamonds, star diamonds, Indian cut diamonds, point cut diamonds, rough diamonds, cleaved diamonds, close stones, cleavage, cleavings, polished diamonds, blue diamonds, yellow diamonds, white diamonds, Indian diamonds, Brazilian diamonds, South African diamonds, Kimberley diamonds, Bulfontein diamonds, DeBeers diamonds, yellow Cape diamonds, Jaegerfontein diamonds and River Goods, the most beautiful in the world, taken from the bed of the Vaal river. The indictment in this case simply says diamonds, which is a comprehensive enough term to cover the almost infinitive variety enumerated.

Every act is presumed to be lawful, unless it be charged to be done under circumstances which render it criminal. As paragraph 467 (p. 539) names certain diamonds as "diamonds" which are free, and which can only be classed, within the general language of paragraph 338 (p. 534), as "precious stones," the indictment should, in describing the offense, have named diamonds which are dutiable, because, *non-constat*, the diamonds charged in the indictment might be non-dutiable. For all that appears in the indictment, the diamonds alleged to

have been smuggled may have been the diamonds specified in paragraph 467 (p. 539), which are on the free list. For all that appears from the allegation of fact in the second count of the indictment, the diamonds were engravers,' glaziers,' and miners' diamonds not set, and are not to be presumed to be diamonds other than miners,' glaziers,' and engravers' diamonds not set. The indictment must show upon its face, by allegations of fact, that a crime was committed. The Court must be able to tell, upon reading the indictment, from the facts therein alleged, that a crime was committed. If it omit such allegations, the indictment is demurrable, and this count of the indictment was duly demurred to by Mr. Herman Keck, plaintiff in error.

The principles of law herein contended for have been illustrated by the English, Federal, and State courts with unanimity. In *Regina vs. Thomas Cox*, 1 Carrington & Kirwin, 494 (1844), the prisoner was indicted for stealing three eggs, of the value of two pence, of the goods and chattels of Samuel Harris. The evidence showed that the eggs stolen were the eggs of the guinea fowl. In holding this indictment invalid, Lord Chief Justice Tindal said:

"The indictment is insufficient. It should have stated what sort of eggs were stolen, for aught that appears on this indictment the eggs might have been adder's eggs, or some other species of eggs, which can not be the subject of larceny."

So in the case at bar, the diamonds alleged to have been smuggled might have been a species of diamonds, to wit, engravers,' glaziers,' or miners' diamonds not set, which can not be the subject of smuggling. It did not help the indictment in the case cited to allege that they were "of the goods and chattels" any more than in the case at bar to allege "goods, wares, and merchandise subject to duty by law," because the indictment must name a class of diamonds which was subject to duty.

In *Commonwealth vs. Bean*, 11 Cushing (Mass.), 414 (1853);

S. C. Beale's Cases on Criminal Law, 38 (approved in 105 U. S., 613), the revised statutes of Massachusetts (Chap. 126, Sec. 42) punished any person who should maliciously or wantonly break the glass or any part of it in any building not his own. The indictment averred that the defendant maliciously and wantonly broke the glass, to wit, two panes of glass in a certain building not the property of the defendant. After a verdict of guilty, the defendant moved in arrest of judgment, because the indictment did not allege that the glass broken was a part of the building, but only that it was in a building not his own. Mr. B. F. Butler appeared as counsel for the defendant and Mr. R. Choate, the Attorney-General, on behalf of the Commonwealth. Judge Metcalfe, who delivered the opinion of the Court, said (at pp. 414–415) as follows:

"It is admitted by the counsel for the Commonwealth that the section of the statute on which this indictment is framed, was intended to punish the malicious and wanton breaking of glass which is part of a building. And it is argued by him that the words used in the indictment, being the same as those in the statute, must be held to have the same meaning. But this does not necessarily follow. The meaning of words in the statute may be and not unfrequently must be ascertained by examination of the context. In the present case, it is from the context that the words "glass in a building" are understood on all hands to mean glass which is part of a building. But the Court, in ascertaining the offense with which the defendant is charged, can not look beyond the words of the indictment itself. If those words do not sufficiently charge the offense which the statute was meant to punish, the indictment is fatally defective. 2 Hawk., c. 25, sec. 111; *Commonwealth vs. Slack*, 19 Pick., 304; *Commonwealth vs. Clifford*, 8 Cush., 215; *Commonwealth vs. Stout*, 7 B. Monroe, 247. We are, therefore, of opinion that the indictment in this case will not sustain a judgment against the defendant. *For aught that the indictment shows, the glass, which he is charged with having maliciously and wantonly broken, may have been panes of glass which were not a part of any building.* Judgment arrested.

In *Commonwealth vs. Newbury Port Bridge*, 9 Pick. 142, (1829); S. C. Beale's Cases on Criminal Law 37, the indictment charged the defendant with having neglected to pro-

vide a proper draw, thereby prevented vessels and river craft from passing the bridge. The defendants moved in arrest of judgment because the indictment did not allege that any bridge had been built. The Court sustained this position and held the indictment bad, in the following opinion (at p. 142), to wit:

"The answer to the first objection is, that the defendants completed the bridge and took toll; and if so we think they were bound to provide the means prescribed by the statute to enable vessels to pass with convenience through the draw. *But we think the objection that the indictment does not allege that any bridge has been built is fatal.*

"*It may be, indeed, inferred by any common reader that there was a bridge; but no lawyer considering that inferences are not to be made in criminal cases, would say it appears that a bridge had been built. There ought to have been an express allegation to that effect.*"

In the well considered case of *State vs. Krider*, 78 N. C., 481 (1878), an indictment was held bad which charged the defendant with stealing "five fishes, the goods and chattels," etc., because there were some kinds of fish, the subject of larceny, and others not the subject of larceny, and the indictment should have set forth a kind that was the subject of larceny.

The indictment in the case of the *United States vs. Cruikshank*, 92 U. S., 542 (1875); S. C. Beale's Cases on Criminal Law 28, was for the violation of Section 6 of the act of May 30, 1870, 16 U. S. Stat. at Large 140, and known as the "Enforcement Act." The counts reviewed by the Court substantially charged the defendant with conspiring to deprive certain citizens of African descent of their rights and privileges under the Constitution of the United States. The indictment charged the crime in the language of the statute, but did not specify any particular right of which the said citizens were deprived. The Court said it was unimportant that the indictment described a statutory offense in the language of the statute, *but the question was whether any offense had been described at all; that there was no specification of any particular*

right, although the language of the indictment was broad enough to cover all.

Chief Justice Waite, in delivering the opinion of the Court, said (at pp. 557–558) as follows:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' (Amendment VI.) In *United States vs. Mills*, 7 Pet., 142, this was construed to mean that the indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged; and in *United States vs. Cook*, 17 Wall., 174, that every ingredient of which the offense is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars. 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, *to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone.* A crime is made up of acts and intents; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

This language of Mr. Chief Justice Waite very happily illustrates the defect in the second count of the indictment. "Diamonds" is a generic term by the classification made by the statute, and includes, on the one hand, brilliant diamonds, rose diamonds, briolette diamonds, etc., which are subject to one of three rates of duty, and on the other hand, engravers,' glaziers,' and miners' diamonds not set, which are upon the free list.

The indictment, in order to state a crime, should have descended so far to particulars as to state upon its face a species of diamonds upon which duties are levied, to wit, diamonds

* Since the foregoing was printed, the case of *United States vs. Gay*, 80 Fed. Rep., 254, decided April 30, 1897, has come into our hands. A petition for a penalty under the contract labor law was held bad on demurrer, because it alleged "*labor and service*," in the language of the statute; and as some kinds of labor and service were not within the reason and spirit of the statute, the petition should have used such qualifying word as would have described labor and service within the reason and spirit of the statute.

other than miners,' glaziers,' and engravers' diamonds not set. The mere conclusion of law in this count of the indictment, that the "goods, wares, and merchandise were subject to duty by law," will not help the defective indictment, because the indictment should have stated the facts, so that the Court might know, upon reading the indictment, whether the diamonds were subject to duty. This takes us to other and further very significant language of Mr. Chief Justice Waite (at p. 558), as follows, to wit:

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify, with some degree of certainty, the articles stolen; this because the accused must be advised of the essential particulars of the charge against him, *and the court must be able to decide whether the property taken was such as was the subject of larceny.*"

So, in this case, the indictment must describe diamonds with that degree of particularity that the Court may decide, upon reading the indictment, whether the diamonds alleged to have been smuggled were subject to duty, because, as we have seen, there are some kinds of diamonds which are, and some which are not, subject to duty.

In *United States vs. Morrissey*, 32 Fed. Rep., 147 (1887), approved in *Blitz vs. United States*, 153 U. S., 308, 315 (1893), and more particularly analyzed hereafter (this brief, p. 41–42), the same rules were applied.

To omit the name of the diamonds alleged to have been smuggled was the omission of a substantial allegation of fact, and rendered the indictment demurrable; and, in addition to the authorities cited, we refer the Court to the following cases as bearing out our contention, to wit: *United States vs. Mann*, 95 U. S., 580, 585 (1877); *United States vs. Carll*, 105 U. S., 611, 612–13 (1881); *United States vs. Hess*, 124 U. S., 483, 486–7 (1887); *Pettibone vs. United States*, 148 U. S., 197, 202 (1893); *Blitz vs. United States*, 153 U. S., 308, 315 (1893); *Moore vs. United States*, 160 U. S., 268, 272 (1895). And this is the rule, even where the in-

dictment follows the language of the statute. Mr. Justice Gray, in *United States vs. Carll*, 105 U. S., 611, 612 (1881). The omission of any material word, though it be but a preposition, adjective or qualifying word, renders an indictment fatally defective. *Jones vs. State*, 21 Texas Appeals, 349 (1886). The indictment must set forth facts charging a crime, and not conclusions, so that the court may know, from the facts set forth upon the face of the indictment, that a crime has been committed. *United States vs. Cruikshank*, 92 U. S., 542, 557–558 (1875); *Commonwealth vs. Dunleay*, 157 Mass., 386, 388 (1892).

A failure to descend to particulars is only permissible where the Grand Jury has before it the article alleged to have been smuggled, and is unable to determine what the article is, *and then it must insert in the indictment the words, "to the Grand Jury unknown."* *People vs. Bogart*, 36 Cal., 245 (1868).

Upon the first argument of this case to this Court, it was contended by the learned Assistant Attorney-General that the indictment in the case at bar was governed by *Dunbar vs. United States*, 156 U. S., 185 (1895). A cursory analysis of the indictment in the case at bar and in the *Dunbar Case*, clearly shows no similarity between them. In the case cited, paragraph 48 of Section 1 of the act of October 1, 1890, Chapter 1244, 26 U. S. Stat. at Large, 567, placed a duty of $12.00 per pound on "opium prepared for smoking." The third count of the first indictment charged the smuggling of "prepared opium subject to a duty by law, to wit, a duty of $12.00 per pound." (The Court at pp. 187–8.) By paragraph 663 of said act of October 1, 1890, 26 U. S. Stat. at Large, 567, "Opium crude, or unmanufactured and not adulterated, containing nine per centum or over of morphia," was placed upon the free list. So that "opium" was both upon the free list and dutiable list. But no *prepared opium* was upon the free list, and therefore when the indictment in the case charged the importation of "prepared opium," it positively pointed to an opium that was the subject of duty, and which could not have been upon the free

list. The indictment descended from the general class of goods and merchandise, to the generic name opium, then descended to a particular kind of opium, to wit: "prepared opium," *and there was no prepared opium upon the free list.* The indictment, therefore, necessarily charged a crime. In the case at bar, the generic term "diamonds" was used without prefix and suffix, and "diamonds," like "opium," are upon both the dutiable and the free list. If the indictment in the *Dunbar Case* had merely charged the smuggling of "opium," and that the "goods, wares, and merchandise were subject to duty by law," the cases would have been parallel, because there would have been no direct charge of smuggling a thing capable of being smuggled. But in the case cited the indictment was for "*prepared* opium," and not merely "prepared opium, which goods, wares, and merchandise were subject to duty by law," but "prepared opium" subject to duty of "$12.00 per pound," the specific rate named for prepared opium by paragraph 48 of the act of Oct. 1, 1890, 26 U. S. Stat. at Large 567. By paragraph 467, act of Aug. 27, 1894 (28 U. S. Stat. at Large, 509), there are three separate rates of duty for dutiable diamonds, and a fourth for imitation diamonds. The learned Assistant Attorney-General is clearly in error when he says there is but one rate of duty.

In the *Dunbar Case* no question was raised as to the sufficiency of the indictment until after the verdict (opinion of Court, pp. 191–192), while in the case at bar, the indictment was duly demurred to.

The objects, purposes, and effects of a demurrer to an indictment are thus set forth in 4 Amer. and Eng. Encyclo. of Law, 777, as follows, to wit:

"A demurrer is an objection on the part of the defendant, who admits the facts alleged in the indictment to be true, but insists that they do not, in point of law, amount to the crime with which he is charged."

So thoroughly did counsel for Mr. Herman Keck, plaintiff

in error, believe in the insufficiency of this count of the indictment, that they demurred thereto, fully conscious of the rule of criminal pleading, that in case of a demurrer being overruled, it was wholly in the discretion of the Court to thereafter allow the defendant to plead to the indictment. The rule and reason therefore is thus stated in 4 Amer. and Eng. Encyclo. of Law, 778, to wit:

"Demurrers in criminal cases seldom occur in practice. Not only is there risk of having final judgment against the defendant, but the same objections may be brought forward in other and safer ways. In cases of defects in substance apparent on the face of the indictment, generally the defendant may, instead of demurring, plead not guilty, and then, if convicted, move in arrest of judgment. Thus, he has a double chance of getting off, first, on the facts of the case, then on the points of law. *But this course can not be taken when the defect in the indictment is cured by verdict.*"

Mr. Herman Keck, plaintiff in error, took the course pointed out by Mr. Justice Brown in *Moore vs. United States*, 160 U. S., 268, 276 (1895), and duly demurred to the indictment, because only in this way could the question be raised so as to be reviewed by this court if denied by the trial court, as could not have been done upon a motion to quash. *Durland vs. United States*, 161 U. S., 306 (1895).

It was also urged by the learned Assistant United States Attorney-General that the defect was cured by Section 1025, of the Revised Statutes of the United States, which reads as follows, to wit:

"Section 1025. No indictment found and presented by a grand jury, in any district, or circuit, or other court of the United States, shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon, be affected by reason of any defect or imperfection *in matter of form only*, which shall not tend to the prejudice of the defendant."

The defect in the second count of the indictment was that it omitted a matter of substance, and not that a matter of substance was alleged defectively. In the *Dunbar Case*, 156 U.

S., 185 (1894), "opium prepared for smoking" was alleged in a defective manner as "prepared opium subject to a duty of $12 00 per pound," and not an entire omission of a matter of substance as in the case at bar. And, furthermore, Mr. Justice Brewer calls attention to the fact (at pp. 191–2) that the sufficiency of the indictment was not raised until after verdict. It was well said (at p. 276) in the later case of *Moore vs. United States*, 160 U. S., 268 (1895), in an opinion delivered by Mr. Justice Brown (in which Mr. Justice Brewer, who delivered the opinion in the *Dunbar Case*, concurred) that where there is a demurrer to a count which is overruled, the objection is neither covered by Revised Statutes, Section 1025, nor cured by a verdict. And in the *Dunbar Case*, Mr. Justice Brewer said (p. 192) that Section 1025 "is not to be construed as permitting the omission of any matter of substance."

In the case of the *United States vs. Morrissey*, 32 Fed. Rep., 147 (1887), the defendant was indicted under Revised Statutes of the United States, Section 5515. This section is as follows, to wit:

"Section 5515. Every officer of election at which any representative or delegate in Congress is voted for, whether such officer of election is appointed or created by or under any law or authority of the United States, or by or under any statute, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such representative or delegate; or who withholds, conceals, or destroys any certificate of record so required by law respecting the election of any such representative or delegate; or who neglects or refuses to make and return such certificate as required by law; or who aids, counsels, or procures, or advises any voter, person, or officer to do any act by this or any of the preceding sections, made a crime, or to omit to do any duty, the omission of it which is, by this, or any of such sections made a crime, or attempts to do so, shall be punished as described by Section 5511."

It is apparent that at the election referred to by this section, a person could vote for State officers, or representatives in Congress, or both. The indictment charged that at an election held for Congressmen the defendant received ballots from persons whom he knew were not entitled to vote. It did not expressly allege that such persons voted for Congressmen, although the indictment did set forth that a Congressional election was being held. Mr. Circuit Judge Brewer (now Mr. Justice Brewer) delivered an opinion holding that the indictment did not charge a crime. Mr. District Judge Thayer delivered a concurring opinion (at p. 152–3) that the indictment was not cured by Section 1025 of the Revised Statutes of the United States. In the case at bar the indictment charged the smuggling of diamonds without naming a kind of diamonds subject to duty, there being diamonds subject to duty and diamonds not subject to duty. This is hardly to be distinguished from the *Morrissey Case*, in which there were ballots cast as charged in the indictment, some of which were ballots for State officers, and as to which no Federal crime could be committed, and others as to Congressmen, as to which a Federal crime could be committed, and the indictment omitted to allege that the ballot was cast for a Congressman. There were in the *Morrissey Case* allegations of conclusions, in the language of the statute, but the Court held that the indictment did not state all of the substantial facts to make out a crime. (Mr. Circuit Judge Brewer, at p. 151; Mr. District Judge Thayer, at pp. 152–3.) This case is quoted with approval in *Blitz vs. United States*, 153 U. S., 308, 315 (1893), where its principles are applied.

It was also urged by the learned Assistant Attorney-General that the remedy of the defendant was to ask for a Bill of Particulars. A Bill of Particulars is the proper remedy only where the allegations of the indictment make out a crime, and do not omit a matter of substance. A defendant is to be free from answering a criminal charge, except upon "indictment

by Grand Jury," and "indictment by District Attorney" is an invasion of his rights. *Ex parte Bain*, 121 U. S., 1 (1886). There is no Federal Statute allowing an indictment to be amended; and one allowing a District Attorney to supply a matter of substance by amendment, whatever its form or name, would be unconstitutional.

The rules governing bills of particulars is thus stated in 1 Bishop New Criminal Procedure (4th ed., 1895), Section 643, to wit:

"Sec. 643. *An indictment which the Court can not pronounce ill* may still omit details, to which defendant is justly entitled, before trial. Thereupon the judge, if applied to, orders a written specification of things called sometimes, and perhaps generally, a bill of the particulars, to be filed with the papers in the cause, and on the trial restricts the prosecuting officer in his evidence to the items therein set down. The application for it is addressed solely to the judicial discretion; hence his decision thereon is not generally open to revision by a higher tribunal.

"It does not constitute a part of the record, and is not the subject of a demurrer."

It is stated with great force in 1 Bishop New Criminal Procedure (4th ed., 1895), Section 646, that:

"*The bill of particulars not being made by the Grand Jury, on oath can not supply any defect in the indictment.*

"Nor, in reason, should the Court suffer any otherwise insufficient allegation to pass on the ground that it has power to order particulars from a person not of the Grand Jury."

If, in the case at bar, the indictment had charged the smuggling of "brilliants subject to a duty of twenty-five percentum," the indictment would have charged a crime, but have done so in a way entitling the defendant to a bill of particulars as to number and value. A brilliant is a cut stone having 58 to 62 facets and used for ornamentation, and is therefore dutiable, and the indictment would have stated a crime. The indictment being in the plural number, the defendant would have been entitled to a bill of particulars, showing how

many brilliant diamonds, and perhaps the value thereof. But in the case at bar the indictment simply said diamonds, which might have been diamonds either for industrial use, such as miners,' glaziers,' and engravers' diamonds not set, or the raw material for diamond-cutting establishments, such as rough diamonds, cleaved diamonds, close stones, cleavage, cleavings, or mellee; or the imported finished products, such as brilliant diamonds, rose diamonds, briolette diamonds, table diamonds, Indian cut diamonds, star diamonds, old English cut diamonds, engraved diamonds, etc. Furthermore, the raw material is also named after the country, or part of country, from which it comes, such as Brazilian diamonds, Indian diamonds, South African diamonds. South African diamonds are again divided into the Kimberly diamonds, Belfontein diamonds, Jaegerfontein diamonds, DeBeers diamonds, yellow Cape Hope diamonds, and River Goods, the most beautiful in the world, taken from the bed of the Vaal River. With the lack of particularity in this count of the indictment, the District Attorney, unaided by the Grand Jury, should not be permitted to re-indict the defendant under the guise of a bill of particulars, when *all* elements entering into a description and identification of the diamond are omitted. In *Moore vs. United States*, 160 U. S., 268 (1895), Mr. Justice Brown said (p 272) that property embezzled should be identified with great particularity, and this rule would apply with even greater force to a case of smuggling, where some diamonds are dutiable and some on the free list. In the case of *Commonwealth vs. Dunleay*, 157 Mass., 386, 388 (1892), it was urged that the defect in that case was merely formal, but the Court held otherwise, because there was nothing on the face of the indictment which would enable the Court, on an inspection of it, to determine what should be added or changed to meet the case intended to be relied on. And the same Court, in an opinion delivered by Mr. Chief Justice Gray in *Commonwealth vs. Chase*, 125 Mass., 202, 203 (1878), held an indictment bad

which charged adulteration of "confectionery" for similar reasons. The learned Assistant Attorney-General relies on the case of *Durland vs. United States*, 161 U. S., 306; *Connors vs. United States*, 158 U. S., 408; *Cochran vs. United States*, 157 U. S., 286; *Dunbar vs. United States*, 156 U. S., 185.

In the case of *Durland vs. United States*, 161 U. S., 306 (1895), the defendant was charged with using the mail for advancing a scheme to defraud. The indictment did not name the person intended to be defrauded, but alleged that their names and addresses were unknown to the Grand Jury. The indictment identified the letters, but did not give their full contents. The Court properly held (p. 315) that the contents should have been obtained by demanding a Bill of Particulars. In the indictment in the case on trial there was no identification of the diamonds at all.

In *Rosen vs. United States*, 161 U. S., 29 (1895), defendant was indicted for mailing indecent and obscene matter. There was no demurrer to the indictment, and no question raised as to its sufficiency until after a verdict of guilty. The Court held (pp. 40–41) that as the indictment identified the paper and publication the remedy was by a Bill of Particulars.

The case of *Connors vs. United States*, 158 U. S., 408 (1895), decides no question as to a Bill of Particulars. *Cochran vs. United States*, 157 U. S., 286 (1894), decides no question as to a Bill of Particulars. In *Dunbar vs. United States*, 156 U. S., 185 (1895), Mr. Justice Brewer suggests that *perhaps* a Bill of Particulars might have been asked for (p. 192). We have already shown that the *Dunbar Case* is to be widely distinguished from the case at bar. Mr. Justice Brewer (at p. 192) held, that in drawing indictments, to omit a matter of substance, as in the case at bar, could not be remedied by a Bill of Particulars, and quoted *United States vs. Carll*, 105 U. S., 611 (1881), with approval.

It was also urged by the learned Assistant Attorney-General that the allegation "goods, wares, and merchandise subject to

duty by law" was equivalent to "diamonds other than miners', glaziers', and engravers' diamonds," and that he was not compelled in an indictment to negative an exception. These are not words of description to distinguish one kind of diamonds from another, but merely the words of the statute. There is no question of negativing an exception in this case, but a question of omitting matters of substance. This indictment was drawn under Section 2865 of the Revised Statutes, and there are no exceptions to that section. The case of *United States vs. Cook*, 17 Wallace, 168 (1872), is relied on. In that case it was contended by the defendant that the United States, in its indictment, should have negatived the proviso of being beyond the shore and beyond the jurisdiction, in the statute of limitations as to prosecution for an offense. As the statute of limitations and the proviso therein, did not go to a description of the offense itself, the Court held that it was not necessary to negative the matter in the statute of limitations. But that a matter of description can not be omitted is pointed out by Mr. Justice Clifford in the following language (p. 174), to wit:

"Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they can not be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such allegation, *as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed.*

"With rare exceptions, offense consists of more than one ingredient, and in some cases of many, and the rule is universal that *every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error.*"

The Court again said (pp. 174–5) that:

"Cases have also arisen, and others may be readily supposed, where the exception, though in a subsequent clause or

section, or even in a subsequent statute, is nevertheless clothed in such language, and is so incorporated, as an amendment, with the words antecedently employed to define the offense, that it would be impossible to frame the actual statutory charge, in the form of an indictment, with accuracy and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause, section, or statute. *Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for the want of clearness and certainty.*"

In *Hirn vs. State*, 1 Ohio St., 15 (1852); S. C. Beale's Cases in Criminal Law, 25, the rule is laid down as follows:

"A negative averment to the matter of an exception or proviso in a statute is not requisite in an indictment, unless the matter of such exception or proviso enter into and become a part of the description of the offense, or a qualification of the language defining or creating it; *but as the exception of the sale of liquor for medicinal and pharmaceutical purposes in the proviso in the first section of the law of 1851, to restrain the sale of liquor points directly to the character of the offense, and becomes a material qualification in the statutory description of it, an indictment under this section is defective without the negative averment.*"

The foregoing quotation is from the syllabus, and is of special force, because, under the rules of the Supreme Court of Ohio, the syllabus is prepared by the judge, concurred in by his associates, and becomes the law of the case. Judge Bartley, who delivered the opinion of the Court, stated (at pp. 24–25) as follows, to wit:

"It is requisite that every indictment should contain a substantial description of all the circumstances descriptive of the offense as defined in the statute, so as to bring the defendant precisely within it. And the only substantial reason for requiring this negative averment at all is that without it the description of the offense would not be complete. When, therefore, the matter of the proviso or exception in the statute, whether it be embraced within what has been termed the enacting clause or not, *enters into and becomes a part of the description of the offense, or a material qualification of the language which defines or creates the offense, the negative allegation in the indictment is requisite.*"

It is clear that the articles mentioned in paragraph 467 of the free list and of paragraph 338 of the dutiable list go to a description and modification of each other,

In the case of *State vs. Brown*, 3 Murphy (N. C.), 224 (1819), S. C. Beale's Cases on Criminal Law, 19, the defendant was charged with being a common Sabbath breaker and profaner of the Lord's Day, in that he sold and exposed to sale divers goods, wares, and spirituous liquors to negroes and others. The indictment did not allege that said negroes and others were not lame or weary travelers. Thereupon the Court arrested the judgment. Judge Henderson, who delivered the opinion of the Court, said (at p. 225) as follows, to wit:

"The Court, upon an inspection of the record, must be able to perceive the alleged criminal act, for an indictment, as was once well observed from this bench by Judge Lowrie, is a compound of law and fact. The latter part of the indictment charges that the defendant kept an open shop and sold divers goods, wares, and spirituous liquors to negroes and others on the Sabbath. This offense as charged is not punishable by indictment, *for if the act can be intended to be lawful, it shall be so presumed unless it be charged to be done under circumstances which render it criminal*, and be so found by a jury. For aught that appears to the contrary, this sale might have been to the lame or weary traveler, or to others to whom it was a merit to sell, instead of a crime; and nothing shall be intended against a defendant. And if this were the sabbath-breaking, spoken of in the foregoing part of the indictment, taking the whole together, the defendant might well have done all charged against him and yet have committed no crime; and as this may have been the case, we are bound to presume it, at least not to presume to the contrary. The judgment must be arrested."

Nor is the mere legal conclusion sufficient that they were "goods, wares, and merchandise subject to duty by law," because the indictment must, by allegations of fact, show that the diamonds were subject to duty; and it was not sufficient to merely follow the language of the statute. *Raugh's Case*, 2 East Pleas of the Crown, 607; *Kind vs. Mason*, 2 Durnford and East, 581, 586 (1788); *People vs. Town of Auditon*, 44

Howard Practice, 238; S. C., 13 Abbot Practice, (N. S.), 431 (1876); *United States vs. Hess*, 124 U. S., 483, 486 (1887).

The indictment in this case was not specifically and definitely drawn as required by the rules of Criminal Pleading and the guarantee provided for in Article VI of the Amendments to the Constitution of the United States. Chief Justice Waite, in *United States vs. Cruikshank*, 92 U. S., 542, 557-8; S. C. Beale's Cases on Criminal Law, 28 (1875); Mr. Chief Justice Gray, in *Commonwealth vs. Chase*, 125 Mass., 202, 203 (1878); *Commonwealth vs. McCance*, 164 Mass., 162 (1895); *People vs. Cox*, 48 Cal. 275 (1870); 1 Bishop New Criminal Procedure (4th Ed., 1895), Sections 98 A., 100 A., 101, 108 and 111; Miller's Constitution 509; 2 Story Constitution (5th Ed.) Sec. 1785.

Third. In the charge as to "smuggling" the indictment should have alleged facts constituting smuggling. The indictment merely follows the language of Section 2865 of the Revised Statutes of the United Statutes. It omits to allege acts of smuggling, facts showing how, in what respect, or in what manner, there was any smuggling.

Smuggling is thus defined in 6 Bacon's Abridgment (5th Ed.), 258, to wit:

"Smuggling consists in the *bringing on shore*, or carrying from the shore, goods and merchandise, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited."

It is defined in 1 Hawkins' Pleas of the Crown (8th Ed.), 661, as follows, to wit:

"Smuggling consists in *bringing on shore*, or in carrying from the shore, goods, wares, or merchandise, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited."

The following is laid down in 1 Russell on Crimes (9th Ed.), 172, to wit:

"Among the offenses against the revenue laws, that of smuggling is one of the principal. It consists in *bringing on shore*, or carrying from the shore, goods, wares, or merchandise, for which the duty has not been paid, or goods of which the importation or exportation is prohibited."

In *Dunbar vs. United States*, 156 U. S., 185 (1895), Mr. Justice Brewer (at p. 193) defines it as follows:

"The fraudulent taking into a country, or out of it, merchandise, which is lawfully prohibited."

There are no common law crimes against the United States Government (*United States vs. Britton*, 108 U. S., 199, 206 (1882); *United States vs. Eaton*, 144 U. S., 677, 687 (1892); and when a Federal law prescribes a punishment for a common-law crime by name, without defining it, the common-law definition is impliedly adopted as part of the statute. *Turner vs. State*, 1 Ohio St., 422, 424 (1853).

In the case of *United States vs. Claflin*, 13 Blatchford, 178 (1875), Judge Benedict adopted the definition contained in the Anti-Moiety Act of June 22, 1874, 18 U. S. Stat. at Large, Chapter 391, p. 186, which define smuggling *for the purposes of that act* in the following language, to wit:

"That for the purposes of this act, smuggling shall be construed to mean *the act*, with intent to defraud, of bringing into the United States, or with like intent attempting to bring into the United States, dutiable articles without passing the same, or the packages containing the same, through the custom house, or submitting them to the officers of the revenue for examination."

If we adopt the common-law definition the indictment should have fully, directly, and expressly alleged that the goods were brought on shore, what shore they were brought on, and how they were brought on shore. Mr. Justice Field stated the rule as follows, in *United States vs. Hess*, 124 U. S., 483, 486 (1888):

"All the material facts and circumstances embraced in the

definition of the offense must be stated, or the indictment will be defective."

Mr. Chief Justice Fuller stated the rule as follows in *Pettibone vs. United States*, 148 U. S., 197, 202 (1893), to wit:

"The general rule, in reference to an indictment, is that *all the material facts embraced in the definition* of the offense must be stated."

If we adopt the definition contained in the Anti-Moiety Act, and which was urged by the learned Assistant Attorney-General, the indictment should have fully, directly, and expressly alleged *an act* of bringing into the United States, without passing the diamonds through the custom house, and further stated what the act was, how it was done, and what custom house the diamonds were not passed through; or have fully, directly, and expressly alleged an act of bringing into the United States, without submitting the diamonds to a revenue officer for examination, and stated what the act consisted of, and what officer of the revenue they were not submitted to for examination; or what act of attempt was done, and how the attempt was made, and what the attempt consisted of. It should not leave the matter to conjecture, whether the defendant was charged with actually bringing in, or that which is repugnant thereto, of attempting to bring in, so that the defendant would have been informed of what he was charged with doing. Mr. Justice Field (at p. 486), in *United States vs. Hess*, 124 U. S., 483, 486 (1888); Mr. Chief Justice Fuller, in *Pettibone vs. United States*, 148 U. S., 197, at p. 202 (1893).

Fourth. In the charge as to "clandestinely introducing," the indictment should have stated the facts. The word "smuggle" means to clandestinely introduce. The word smuggle seems to be synonymous with the words "clandestinely introduce." The word "clandestine" means to withdraw from public notice for an evil purpose. The word "clandestinely"

means in a secret manner. The word "introduce" means to bring in. The word "smuggle" means to secretly bring in, and the words "clandestinely introduce" mean to secretly bring in. The words "clandestinely introduce into the United States" have no technical meaning, and the indictment should have set forth how the acts were clandestine, what were the clandestine acts, what were the acts of introduction, and how the diamonds were introduced. These should have been set forth fully, directly, and expressly, and without any uncertainty and ambiguity, and not inferentially or by way of recital. It was not sufficient to set forth the crime in the language of the statute, because this statute does not set forth all the facts and elements necessary to constitue a "clandestine introduction." In *United States vs. Cruikshank*, 92 U. S., 542; S. C. Beal's Cases on Criminal Law, 28 (1875), the defendant was indicted, *in the language of the statute*, for depriving colored citizens of their rights under the Constitution of the United States, contrary to the sixth section of the act of May 30, 1870, 16 U. S. Stat. at Large, 140, known as the Enforcement Act. The indictment did not set forth what the rights were, and the Court held that it was immaterial that the indictment followed the language of the statute.

In the *United States vs. Mann*, 95 U. S., 580 (1877), an action was brought against the defendant to recover a forfeiture for an alleged violation of Section 3177 of the Revised Statutes. Section 3177 authorized certain officers to enter buildings where subjects of tax are kept, to examine the same. The petition followed the language of the statute and the trial court sustained a demurrer thereto. On error to this Court the judgment of the trial court was affirmed, because the declaration merely followed the language of the statute, and did not set forth with particularity the facts showing a violation.

In *United States vs. Simmons*, 96 U. S., 360 (1877), the de-

fendant was indicted for violating Section 3266 of the Revised Statutes, in that the defendant procured another person to use a still boiler or other vessel for the purpose of distilling with the intent and meaning of the Internal Revenue laws of the United States. The indictment did not name such other person or aver that the same was unknown. The indictment further alleged that such use was in a certain building and on certain premises where vinegar was manufactured and produced. The indictment did not specifically state that vinegar was manufactured or produced at the time the still and other vessels were used for the purpose of distilling. The Court held that although the indictment followed the language of the statute (pp. 362–3), that it should have set forth the facts showing how and in what respect the things were done, and the name of such other person. We have heretofore quoted the language (this brief, p. 25) of Mr. Justice Harlan in this case.

In the *United States vs. Carll*, 105 U. S., 611 (1881), the defendant was indicted for violating Section 5431, of the Revised Statutes of the United States, which is in the following language, to wit:

"SECTION 5431. Every person who, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or brings into the United States, with intent to pass, publish, utter, or sell, or keeps in possession or conceals with like intent, any falsely made, forged, counterfeited, or altered obligation, or other security of the United States, shall be punished by a fine of not more than Five Thousand Dollars, and by imprisonment at hard labor not more than fifteen years."

The indictment followed the language of the statute. Both the statute, and the indictment following it, omitted to allege that the defendant knew the obligations to be false, forged, counterfeited, and altered. It was urged that as the indictment followed the language of the statute that such allegation was unnecessary, but Mr. Justice Gray held otherwise in the following language (pp. 612–613), to wit:

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the Court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

In *United States vs. Hess*, 124 U. S., 483 (1888), the defendant was indicted, in the language of the statute, for a violation of Section 5840 of the Revised Statutes of the United States by a scheme to defraud through the use of the United States mails. The Court held that it was insufficient to describe the offense in the language of the statute, and that the indictment should have descended to particulars constituting devising a scheme, and that such particulars are a matter of substance and not of form.

In delivering the opinion of the Court (pp. 486–487) Mr. Justice Field said:

"The statute upon which the indictment is founded only described the general nature of the offense prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury. The general, and, with few exceptions—of which the present is not one—the universal rule on this subject is, that *all the material facts and circumstances embraced in the definition of the offense* must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission can not be supplied by intendment or implication, and the charge must be made directly and not inferentially, or by way of recital."

And again (p. 487), to wit:

"The doctrine invoked by the Solicitor-General, that it is sufficient, in an indictment upon a statute, to set forth the offense in the words of the statute, does not meet the difficulty here. Undoubtedly the language of the statute may be used

in the general description of an offense, *but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.*"

In *Pettibone vs. United States*, 148 U. S., 197 (1893), defendant was indicted, under Revised Statutes, Section 5399 and Section 5440, as amended, 21 Stat., 4, c. 8, for obstructing the administration of justice and conspiring to interrupt the administration of justice. The indictment followed the language of the statute. Mr. Chief Justice Fuller, in delivering the opinion to the Court, said (p. 202) that:

"The general rule, in reference to an indictment, is, that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission can not be supplied by intendment or implication. The charge must be made directly, and not inferentially or by way of recital."

In *Blitz vs. United States*, 153 U. S., 308 (1894), the defendant was indicted for a violation of Section 5511 of the Revised Statutes of the United States. This section prescribed a punishment—if, at any election for Representative in Congress, a person should knowingly impersonate and vote in the name of any other person. At the election votes were received for both the State officers and Congressmen. The indictment followed the language of the statute, but did not expressly allege that the defendant voted for a Representative in Congress. The Court held the indictment insufficient, and in the course of its opinion, Mr. Justice Harlan said (p. 315) that:

"The general rule that an indictment for an offense purely statutory is sufficient if it pursues substantially the words of the statute is subject to the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. *United States vs. Simmons*, 96 U. S., 360, 362; *United States vs. Hess*,

124 U. S., 483, 488. As said in *United States vs. Carll*, 105 U. S., 611, 612, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

To have merely alleged that the diamonds were clandestinely introduced was to violate every rule of criminal pleading, because the words "clandestinely introduce" have no fixed technical meaning, and the indictment should have set forth facts showing in what respect it was claimed the overt acts were clandestine, and what the overt acts were, and should have stated in what respect the overt acts of introduction consisted, and what were the overt acts. As the words "clandestinely introduce" do not of themselves fully, directly, and expressly inform the defendant of the overt acts relied upon, it was insufficient to have merely followed the language of the statute. This is clearly illustrated by the long line of cases (decided by this Court) referred to, and also Bishop Statutory Crimes, Section 418; *Titus vs. State*, 49 N. J. Law, 36 (1886); *People vs. Town of Auditon*, 44 Howard Pr., 238; S. C., 13 Abb. Pr. N. S., 431 (1876). Laws creating crimes must be explicit, so that all men may know what acts to avoid; and an indictment must directly set forth facts bringing the accused plainly and unmistakably within the statute. *United States vs. Brewer*, 139 U. S., 278, 288 (1891).

Fifth. No facts are stated showing that the diamonds ought to have been invoiced. Revised Statutes of the United States, Section 2865, makes it the offense to smuggle goods subject to duty, and which *should have been invoiced* without paying the duty. *Titus vs. State*, 49 N. J. Law, 36 (1886). There are some goods which must be invoiced, and others which it is unnecessary to invoice. The indictment omitted to allege facts showing the diamonds alleged to have been smuggled ought to have been invoiced, and merely followed the language of the statute.

The act of June 10, 1890, 26 U. S. Stat. at Large, 131, to simplify the laws in relation to the collection of the revenues, provides, in Section 4, as follows, to wit:

"SEC. 4. That, *except in case of personal effects accompanying the passenger*, no importation of any merchandise exceeding $100.00 in dutiable value shall be admitted to entry without the production of a duly certified invoice thereof as required by law, or of an affidavit made by the owner, importer, or consignee before the collector or his deputy, showing why it is impracticable to produce such invoice."

The indictment should have alleged that the diamonds were not personal effects accompanying a passenger. It was insufficient to follow the language of the statute, as we have already shown (this brief pp. 31–38; pp. 51–56), and the indictment should have directly, expressly, and fully stated *facts* showing that the diamonds should have been invoiced without uncertainty or ambiguity, and not by conjecture, inference, or implication. For all that appears from the face of the indictment, the diamonds may have been the personal effects accompanying a passenger, and no crime could have been committed under section 2865 of the Revised Statutes, as amended February 27, 1877 (19 Stat., 247).

The crime under Revised Statutes of the United States, Section 2865, as amended February 27, 1877, 19 U. S. Stat. at Large, 247, heretofore set forth (this brief p. 28), consists of many elements, one of which is the smuggling of goods "which should have been invoiced." The statute has added this element to the common law crime of smuggling, and the existence of this element is necessary to constitute the offense. *Titus vs. State*, 49 N. J. (Law), 36 (1886).

In *United States vs. Nolton*, 5 Blatchford, 427 (1867), the defendant was indicted for smuggling goods from Canada into the United States in violation of the act of August 30, 1842, 5 United States Statutes at Large, 565, Section 19, now Section 2865 of the Revised Statutes of the United States, as amended February 27, 1877 (19 Stat., 247). This section then, as now,

made it a crime *to smuggle goods "which should have been invoiced."* As the act of March 2, 1821, 3 United States Statutes at Large, 616, Section one (1) did not require "an invoice" when goods were brought into the United States from an adjoining country (Canada), *Mr. Circuit Justice Nelson* quashed the indictment, and held that there could be no violation of Section 19 of the act of August 30, 1842 (5 Stat., 565), now Section 2865, Rev. Stat., as amended February 27, 1877 (19 Stat., 247.)

In the case at bar there are no allegations of fact setting forth the element of the crime that the diamonds alleged to have been smuggled "should have been invoiced." The indictment is barren of any allegation of fact showing that the goods ought to have been invoiced. The indictment merely following the language of the statute, which this court, by a uniformity of decisions, has held to be insufficient. The indictment, therefore, omits an allegation of fact showing that the goods ought to have been invoiced, omits a matter of substance, and the demurrer thereto should have been sustained.

The words, "*except in case of personal effects accompanying the passenger,*" divided goods to be brought into the United States into two classes:

FIRST.—Goods which must be invoiced, and as to which it is possible to violate Rev. Stat., Sec. 2865, amended February 27, 1877 (19 Stat., 247), and be guilty of smuggling;

SECOND.—Goods which need not be invoiced, and as to which it is impossible to violate Rev. Stat., Sec. 2865, amended February 27, 1877 (19 Stat., 247), and as to which one can not be guilty of smuggling.

This indictment to have been good should, therefore, have alleged facts bringing the goods within the first class. The indictment should have expressly alleged that the diamonds were not "personal effects accompanying the passenger." *United States vs. Cook*, 17 Wallace, 168, 174, 174–175 (1872);

Mr. Justice Clifford at page 174 and 174–175 (this brief, pp. 46–47); *Hirn vs. State*, 1 Ohio St., 15, 24–25 (1852); s. c. Beale's Cases on Criminal Law, 25; *Judge Bartley*, at pages 24–25 (this brief, pp. 47–48); *State vs. Brown*, 3 Murphy (N. C.), 224, 225 (1819); s. c. Beale's Cases on Criminal Law, 19; *Judge Henderson* at page 225 (this brief, p. 48). *United States vs. Cruikshank*, 92 U. S., 542, 557–558 (1875); *Mr. Chief Justice Waite*, at pp. 557–558 (this brief, pp. 36–37); *Moore vs. United States*, 160 U. S. 268, 270 (1895); *Evans vs. United States*, 153 U. S., 584, 587 (1894); *United States vs. Mann*, 95 U. S., 580, 583–584 (1877). In the *Titus Case*, heretofore cited (*Titus vs. State*, 49 N. J. Law, 36), the syllabus is as follows, to wit:

"When a statute, in defining a crime, refers by name to another well-known crime, and makes such named crime a constituent of the defined crime, in an indictment for the latter, it is not sufficient to use the mere statutory language, but the particulars constituting the named crime must be shown."

Precedents. It is unsafe to follow precedents, in view of the decisions of this court already cited, the peculiar language of the Anti-Moiety Act of June 22, 1874, 18 U. S. Stat. at Large, 186, Section 4, and the act to simplify the laws in relation to the collection of revenues of June 10, 1890, 26 U. S. Stat. at Large, 131, Sec. 4, and the classification of diamonds by the Act of August 27, 1894 (28 Stat., 509), paragraphs 338 and 467. Mr. Justice Grose (at pp. 586–7) in *King vs. Mason*, 2 Durnford and East, 581 (1788).

III.

Second Count of Indictment — Erroneous Conviction Under.

(1) In order to constitute a violation of the Act of February 27, 1877, 19 Stat. 247, amending Rev. Stat., Sec. 2865, the following elements must exist and be established by the evidence: (a) smuggling or clandestinely introducing into the United States, (b) goods, wares, and merchandise, (c) which should have been in-

voiced, (d) and as to which the invoice is omitted, (e) goods, etc., subject to duty, (f) the duty not having been paid, (g) done knowingly and willfully, and (h) all with intent to defraud the revenue of the United States.

(1 a) If a statute contain a word having a technical meaning, such word shall be given that technical meaning. The word "smuggle" has a well-defined technical meaning, and means bringing on shore or carrying from shore, goods, wares, or merchandise for which duty has not been paid, or goods of which the importation or exportation is prohibited.

(1 b) Criminal statutes are to be accurately and strictly construed, and can not be extended by implication to cases not falling within their terms. Words can not be read into a statute or out of a statute, and this rule is peculiarly applicable to penal laws. The Act of June 22, 1874, 18 Stat. 186, Sec. 4, defines "smuggling" for the purposes of that act. Such definition can not be extended by implication to the Act of February 27, 1877, 19 Stat. 247, amending Sec. 2865, Rev. Stat.

(1 c) Words of a statute are to be read in connection with those with which they are used. The Act of Feb. 27, 1877, 19 Stat. 247, amending Section 2865, Rev. Stat., provides a penalty for importing or clandestinely introducing into the United States goods, etc., subject to duty by law which should have been invoiced and without paying the duty. The obligation to pay duty does not arise until after the importation is complete, and if no overt act be done after the importation is complete, there is no smuggling or clandestinely introducing into the United States.

(1 d) The omission to get a consular invoice for diamonds, a failure to put them on a manifest, the placing them in a state-room of a ship at Liverpool, the arriva of a ship within the port of Philadelphia, the demand on board the ship for the diamonds by a revenue officer, who makes himself known as such, the taking of the diamonds and delivering the same to him, does not constitute smuggling or clandestinely introducing into the United States.

(1 e) It is no offense against the Act of Feb. 27, 1877, 19 Stat. 247, amending Section 2865, Rev. Stat., when there is no legal obligation to procure an invoice. By Section 4 of the Act of June 10, 1890, 26 Stat. 131, there is no obligation to procure an invoice of personal effects accompanying a passenger, and a Captain of a steamship is a passenger within the meaning of said act and does not cease to be such by being Captain. Therefore, if the Captain of a steamship smuggles or clandestinely introduces diamonds, without paying duty thereon, he is not guilty of the statutory offense contained in the Act of February 27, 1877, 19 Stat. 247, amending Sec. 2865, Rev. Stat.

(1 f) The corpus delicti must be clearly identified, and without proof of the corpus delicti there can be no conviction. If, on a charge of smuggling and clandestinely introducing, a person marks a package in Europe for the purposes of identification, and a package is seized on board a steamship in the port of Philadelphia having no address thereon, there is failure of proof of the corpus delicti, and there can be no conviction.

(2) Rev. Stat., Sec. 1035, provides that a defendant may be found guilty of an attempt to commit the crime charged, provided such attempt be itself a separate offense. An attempt to smuggle or clandestinely introduce has never been made a separate offense, and there can be no conviction of an attempt.

(3) There is a broad distinction between an intent and an attempt; there is a wider distinction between acts which constitute a preparation, and the after overt acts of an attempt.

(3a) Obtaining diamonds in Europe, with the intention of smuggling into America, omitting to get a consular invoice, placing them in state-room on a steamship at Liverpool, omitting them from a ship's manifest, steering the ship into the port of Philadelphia, accompanied with the intention to smuggle, when nothing more is done, while they may constitute the distinctive offenses of omitting from the manifest, or importing contrary to law, do not amount to more than overt acts of preparation, and there is no overt act of an attempt to smuggle.

(3b) When such diamonds remained in the state-room of the steamer, where they had been placed at Liverpool, and a revenue officer boards the ship at Philadelphia and makes himself known as such, and demands the diamonds, and the Captain goes to the state-room, gets the diamonds, and delivers them up to the officer, there is no overt act of an attempt to smuggle.

The second count of the indictment (original record, p. 4-5, printed pp. 1-2) charged Mr. Herman Keck, plaintiff in error, with having smuggled and clandestinely introduced into the United States 563 diamonds without paying the duty thereon. This charge is based upon the following language of Section 2865 of the Revised Statutes of the United States, as amended February 27, 1877, Chapter 69, 19 U. S. Statutes at Large, 247, to wit:

"If any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce into the United States any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, * * * * shall be deemed guilty of a misdemeanor."

The only witness on behalf of the United States testifying directly to the alleged transaction was Captain Frank Loesewitz. As appears from the Bill of Exceptions, the story as told by him is substantially as follows: That he was a native, citizen, and resident of Antwerp, Belgium; by occupation a seafaring man, and captain of the steamer Rhynland, plying between Philadelphia and Liverpool. On the 27th day of January, 1896, witness made a social call at the residence and place of business of Mr. Van Hammelrick, in Antwerp, Belgium, Mr. Van Hammelrick being a friend of twenty-five years' standing, and the owner of a jewelry store. Just as witness was leaving, Mr. Van Hammelrick come with a person whom

the witness identified in court as Mr. Herman Keck, the plaintiff in error, and Mr. Van Hammelrick invited witness to go and have a glass of beer. The strange person was introduced, but his name was not given. The three went to the Café Alsacienne, on the Place Verte, sat down at a table, and each ordered a glass of beer. The place was crowded, and there were thirty or forty people about. Mr. Van Hammelrick spoke in Flemish. While they were sitting there, Mr. Hammelrick took a small package from his pocket, showed it to witness, and said, "This package belongs to that person here," and Van Hammelrick further said to witness, "Will you oblige me take that over to America? It belongs to him; it belongs to that gentleman; he's a customer of mine; it does not contain any valuables." Witness asked the stranger, "Where shall I send it to?" The stranger tore a piece of paper off a card lying on the table and put an address on it. The name on it was T. Van Reeth, Fourth Street, Cincinnati—either No. 21 or 24, and witness thought 21. Witness put the package and paper in his pocket, and after being at the cafe a quarter of an hour, the three separated on Place Verte, where Mr. Keck told witness to send the package by Adams Express. Witness sailed from Liverpool on January 29, 1896.

The record (from the testimony of Captain Loesewitz) shows the facts as follows (original record, pp. 77–79; printed p. 34), to wit:

Q. Where did you put the package—in your pocket loose?
A. I put it loose in my pocket.
Q. Where did you put the paper?
A. Along with it—along with the box.
Q. Loose?
A. Along with the box.
Q. You never tied the paper to it?
A. No, sir.
* * * *
Q. You put that address loose in your pocket, without attaching it to the package in any way?
A. Yes, sir.

Q. When you got aboard the ship, where did you put the package?

A. In the drawer.

Q. Where did you put the paper?

A. Afterwards I put it in a little case.

Q. In a pocket book or something of that kind?

A. Yes, sir; in a pocket book.

By the Court:

Q. Why did you not put the paper containing the address on the package—fasten it there? Why did you keep them separately?

A. I kept that and put it afterwards with the package *in another paper and wrote the address on myself.*

When the Rhynland reached the port of Philadelphia the following took place, as testified to by the witness Captain Frank Loesewitz (original record, p. 66; printed, p. 27), to wit:

"Two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, yes. I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were Treasury agents, and said, 'Captain, that is a package of diamonds you have got to be sent to Cincinnati, and if I did not deliver it I would be arrested.' After a while I went down in my room and brought the package up and delivered it over to the Treasury agents. That is all that happened."

The package seized by Officer Gallen had no address upon it (original record, p. 95; printed, p. 44). The package Captain Loesewitz claims to have received from Mr. Herman Keck contained an address put thereon by himself (original record, pp. 77–79; printed, p. 34).

The witness further testified (original record, pp. 81–82; printed, pp. 36–37), that he had been in the habit of bringing over small packages in the same way he had brought this package, and that after the vessel had been docked he would go to a custom officer on the dock and report the fact. In this case he had not had time to go on the dock, as the Treasury agents came aboard before he had time to go upon the dock.

The testimony of Mr. Herman Keck, plaintiff in error, was a direct and categorical denial of the statements made by Captain Frank Loesewitz, as to all matters directly affecting Mr. Keck.

The Court, in its charge, said to the jury (original record, p. 208; printed, p. 112):

"*Gentlemen of the jury:* The several statutory provisions under which the defendant is indicted have been read to you and are doubtless understood. I need not undertake to explain them, or to dwell upon the law governing the case. It is sufficient to say in this respect, that *if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged.*"

To the following part of the foregoing language, to wit:

"It is sufficient to say in this respect that *if the statements made here under oath by Captain Loesewitz*, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

Mr. Herman Keck, plaintiff in error, the jury being then and there at the bar of the Court, then and there excepted, which exception was then and there duly allowed by the Court (original record, pp. 209–210; printed, p. 113), and the same appears as assignment number seventeen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for writ of error (original record, pp. 226–227; printed p. 120).

Mr. Herman Keck requested the Court to give a binding instruction to find the defendant not guilty (original record, p. 204; printed, p. 110). This was refused by the Court, and an exception taken (original record, p. 208; printed, p. 112), and was assigned as number ten in the assignment of errors (original record, pp. 216–217; printed, p. 116). The fourth request was for a binding instruction to return a verdict of not guilty upon this count of the indictment (original record, p. 205; printed, p. 110). The Court disallowed the same and an exception was taken (original record, p. 208; printed, p.

112), and is assigned as number twelve in the assignment of errors (original record, pp. 217–218; printed, p. 116), and in the petition for a writ of error (original record, p. 226; printed, p. 119). Assignment number thirteen in the assignment of errors (original record, pp. 218–219; printed, p. 116) will be more specifically noticed hereafter. Assignment number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117), refers to the answer of the Court to the request for special instruction number 10. The Court said (original record, p. 207; printed, p. 112) to wit:

"The Court affirms the tenth point generally, but the meaning ascribed to it by the Court is, that the jury shall be fully convinced, from a careful examination of all the testimony heard, that the defendant is guilty of the *smuggling* charged *as testified to by Captain Loesewitz*, and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilt generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal, and should be acquitted."

An exception was taken to this answer of the Court (original record, p. 208; printed, p. 112), and the ruling of the Court was assigned as number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117–118).

The rulings of the Court just detailed are erroneous for three reasons: 1. The facts do not constitute smuggling, or clandestinely introducing; 2. An attempt to smuggle, or clandestinely introduce, is not alleged; 3. If an attempt to smuggle, or clandestinely introduce, has been properly alleged, the facts do not make out a case of an attempt.

First.—The facts do not constitute smuggling, or clandestinely introducing. The second count of the indictment is based on Rev. Stat., Section 2865, as amended February 27, 1877, 19 Stat. at Large, Chapter 69, page 247 (heretofore set out; this brief, p. 28). In order to constitute a crime the following elements must exist:

(1) *Smuggling or clandestinely introducing into the United States,*

(2) Goods, wares, or merchandise,

(3) Which should have been invoiced,

(4) And as to which the invoice is omitted,

(5) Goods, etc., subject to duty,

(6) The duty not being paid,

(7) Done knowingly and willfully,

(8) All with intent to defraud the revenue of the United States.

The word "*smuggle*" has a well-defined technical meaning. The authorities, 1 Hawkins' Pleas of the Crown (8th Ed.), 661; 6 Bacon's Abridgement (5th Ed.), 258; and 1 Russel on Crimes (9th Ed.), 172 (heretofore set forth; this brief, pp. 49–50), define smuggling as follows, to wit:

"It consists in *bringing on shore*, or carrying from the shore, goods, wares, or merchandise, for which the duty has not been paid, or goods of which the importation or exportation is prohibited."

It is a well-known rule of interpretation that if a statute contain a word having a technical meaning, such word shall be given that technical meaning. *McCool vs. Smith*, 1 Black (66 U. S.), 459, 468–469 (1861), quoting *Hillhouse vs. Chester*, 3 Day, 166, with approval; *Grogan vs. Garrison*, 27 Ohio St., 50, 63 (1875); *Abbotsford vs. Johnson*, 98 U. S., 440, 444 (1878); Black on Interp., 130; Sutherland on Stat. Con., 331, 333; Wilberforce on Statute Law (English Ed., 1881), 124–125; Hardcastle on Construction (2d English Ed., 1892), 184; 1 Kent's Commentaries, 462; Maxwell on Interp. (3d English Ed., 1896), 2–3. And, although there are no common-law crimes against the United States Government (*United States vs. Britton*, 108 U. S., 199, 206 (1882); *United States vs. Eaton*, 144 U. S., 677, 687 (1892)), yet when a Federal law prescribes a punishment for a common-law crime by name, without defining it, the common-law definition is impliedly adopted as part of the statute. *Turner vs. State*, 1 Ohio St., 422, 424–425 (1853).

It, therefore, follows that the word "*smuggle*" should be

given the meaning set forth in 1 Hawkins' Pleas of the Crown (8th Ed.), 661; 6 Bacon's Abridgement (5th Ed.), 258; and 1 Russel on Crimes (9th Ed.), 172.

The regular course pursued in shipping merchandise to America is as follows: The invoice is produced to the American Consul at the place where the merchandise is purchased, and the same is duly certified to by the Consul. Act of June 10, 1890, 26 U. S. Stat. at Large, Chapter 407, page 131. An omission to get a consular invoice is not smuggling or clandestinely introducing or an attempt to smuggle. The next step is to put the goods on board the ship. That does not constitute smuggling or clandestinely introducing or an attempt to smuggle. The next step is for the Captain of the vessel to put the goods on his manifest. Revised Statutes United States, Section 2806. An omission so to do is not smuggling or clandestinely introducing or an attempt to smuggle, but is a distinct offense of omitting goods from the manifest. Revised Statutes of the United States, Section 2809. The next step is to steam or sail the vessel from the port of departure into the high seas and then into the port of entry. That is not smuggling or clandestinely introducing into the United States, or an attempt to smuggle. After the ship arrives the manifest must be produced. Revised Statutes United States, Sections 2811 and 2812. An omission to produce the manifest is not smuggling or clandestinely introducing or an attempt to smuggle, but a distinct offense under Revised Statutes of the United States, Section 2814.

If goods be upon board the ship and without a consular invoice, and without appearing upon the manifest, it may be so from one of two reasons: 1. Because there is no intention to take them ashore in that port; or, 2. From a yet unexecuted intention of smuggling them ashore from the ship at the port of arrival. If a person has an intention to smuggle and the ship arrives in the port of entry with the goods on board, there may never be a crime of smuggling or

clandestinely introducing or attempting to smuggle. There may be either a sudden destruction of ship and cargo by storm, or an abandonment of the intention, before attempting to carry it into effect, or a seizure of the goods before an attempt is made to carry the intention into effect. The principle governing each of these classes is the same, all being cases of unexecuted intention, or intention without the overt act, arising, in one case, from the act of God; in the other, from the act of repentance before attempting the wrong, and the last by the act of this government.

The question presented is not whether Mr. Herman Keck, plaintiff in error, is guilty of a crime, but whether he violated the act of February 27, 1877, 19 Stat. at L., 247, amending Section 2865, Rev. Stat. In interpreting a statute it is not proper to take merely the abstract meaning of isolated words. Words are to be taken in the connection in which they are used. Black on Interp., 169; Sutherland on Statutory Construction, Sec. 246, pp. 325–326; Wilberforce, Statute Law (English Ed., 1881), 108–111; Hardcastle, Construction of Statutes (Second English Ed., 1892), 171–172; Maxwell on Interp. (Third English Ed., 1896), 40; *Pennington vs. Coxe*, 2 Cranch., 33 (1804). It is an improper mode of interpretation to take the word "smuggle" or the words "clandestinely introduce" by themselves. As we have heretofore stated (this brief, p. 65–66), the offense under the act of February 27, 1877, 19 Stat., 247, amending Sec. 2865, Rev. Stat., eight elements must exist. This statute prescribed a penalty of fine or imprisonment, or both, for (a) smuggling or clandestinely introducing (b) into the United States (c) goods, etc., subject to duty (d) which should have been invoiced (e) without an invoice, (f) *without paying the duty*. The words "smuggle" or "clandestinely introduce" refer to overt acts committed after the obligation has arisen to pay the duty. This obligation does not arise until the vessel arrives within the port of entry with intent to unlade. Carr, Judicial Inter-

pretation of the Tariff Acts, Sec. 97, pp. 44–45. *Arnold vs. United States*, 9 Cranch, 104 (1815); *Hartranft vs. Oliver*, 125 U. S., 525 (1888); *Seeberger vs. Schweyer*, 153 U. S., 609, 611–613 (1894); *Sherman vs. Robertson*, 136 U. S., 570 (1889).

Carr in his commentary on "Judicial Interpretation of the Tariff Acts," 44–45, states the rule thus:

"SEC. 97. To constitute an importation so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry."

In *Arnold vs. United States*, 9 Cranch 104 (1815), *Mr. Justice Storey* said (p. 120):

"It is further contended that the importation was complete by the arrival of the vessel within the jurisdiction limits of the United States on the 30th day of June. We have no difficulty in overruling this argument. To constitute an importation so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry. This was expressly decided in the case of the *United States vs. Vowell*, 5 Cranch, 368."

In *Hartranft vs. Oliver*, 125 U. S., 525 (1888), *Mr. Justice Field* said (p. 528):

"Ordinarily, goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse; and thus the designation of the goods as thus placed is, in the legislation of Congress, in effect a designation, and no more, of their being in such custody. But goods on board a ship, in charge of a custom-house officer, preliminary to their removal to a public store or a bonded warehouse, and during the time necessary for that purpose, are in like custody, and so are, within the spirit and intent of the law, subject only to such duties as are leviable when the goods are freed from such custody. So far as the Government is concerned, they are in the same position as if technically in a public store or bonded warehouse. When in either of those places, they can not be removed without a permit from the collector. When on ship-board in charge of a custom-house inspector, they are in the same condition, and can not be removed without a like permit. By statute, collectors are required to put one or more inspectors on board of every vessel immediately on her coming within a collection district; and no merchandise can

be unloaded or removed from the vessel without a permit in writing from the collector. Rev. Stat., Sections 2875, 2876."

The foregoing case (*Hartranft vs. Oliver*, 125 U. S., 525) was quoted with approval and applied in *Sherman vs. Robertson*, 136 U. S., 570 (1889), and *Seeberger vs. Schweyer*, 153 U. S., 609 (1894).

Upon the arrival of the steamer Rhynland within the port of entry of Philadelphia, the vessel and its cargo was in the custody of the custom-house officials. Nothing was done. There was no overt act after the constructive possession of the cargo by the custom-house officials, after the importation was complete, *after the obligation to pay duties accrued*, the diamonds having been seized by Revenue Officer Gallen before any overt acts were thereafter committed. And this is true, whether we take the story as detailed by Captain Frank Loesewitz (original record, p. 66; printed, p. 27), or that of Revenue Officer Gallen (original record, pp. 93-94; printed, pp. 43-44), for in both cases Captain Loesewitz delivered the diamonds on board the steamer Rhynland to Revenue Officer Gallen, whom he knew to be such. Even if different legal consequences could be attached to the acts as detailed by Captain Frank Loesewitz and Revenue Officer Gallen, it is clear that no legal consequences could be attached to the facts detailed in the story of Captain Frank Loesewitz, and the learned trial judge based his instructions wholly upon the hypothesis of a belief by the jury in the story told by Captain Loesewitz (original record, pp. 208; printed, p. 112; original record, p. 207; printed, p. 112).

In the case on trial, Captain Loesewitz testified that he put the diamonds in his state-room at Liverpool, where they remained until Mr. Gallen, a revenue officer, came aboard the ship at Philadelphia, made himself known to be a revenue officer, and demanded the diamonds, and they were thereupon delivered to Mr. Gallen (original record, p. 66; printed. p. 27). It therefore follows that the diamonds were never smuggled

or clandestinely introduced. Such being the case, it was clearly erroneous for the Court to charge the jury that if they believed the story of Captain Loesewitz they must find the defendant guilty; to refuse the request to find the defendant not guilty; to refuse the request to find the defendant not guilty on the second count in the indictment; to say to the jury in response to a request for a special instruction, that they should return a verdict of guilty, generally, if they were convinced that the defendant was guilty of smuggling as charged, as testified to by Captain Loesewitz. The authorities are conclusive that there was no smuggling. It was well said in 6 Bacon's Abridgment (5th Ed.), 286 that:

"As the offense of *smuggling is not complete* unless some goods, wares, or merchandise *are actually brought on shore*, or carried from shore contrary to law, a person may be guilty of divers practice which have a direct tendency thereto, *without being guilty of the offense.*"

It was contended, at the former argument of this case, by the learned Assistant Attorney-General, that the definition of the word "smuggle" contained in Section 4 of the Anti-moiety Act of June 22, 1874, 18 Stat. at L., 186, Chap. 391, is to be given the word "smuggle" contained in the act of February 27, 1877, 19 Stat. at L., Chap. 69, p. 247, amending Section 2865, Rev. Stat. The definition of the word "smuggle" as contained in the Anti-moiety Act is expressly confined to that act, in the following language, to wit:

"SEC. 4. . . . *Provided*, that *for the purposes of this act* smuggling shall be construed to mean," etc.

The meaning of a legislative body is to be determined by what it says in its statutes. The expressed meaning is to govern. *Lake County vs. Rollins*, 130 U. S., 662, 670 (1889); *Thornley vs. United States*, 113 U. S., 310, 313 (1885); *Bruner vs. Briggs*, 39 Ohio St., 478, 484 (1883); *Woodbury vs. Berry*, 18 Ohio St., 456, 461–462 (1869). It is a settled principle of interpretation, that you can neither read words into a statute, nor out of a statute, and this rule is peculiarly applicable to penal

laws. The Anti-moiety act was passed June 22, 1874, and confined the definition of smuggling therein contained to that act. When Congress had before it the bill which subsequently became the act of February 27, 1877, 19 U. S. Stat. at L., Chap. 69, page 247, amending Section 2865, it was fully conscious that the definition contained in the Anti-moiety Act was expressly confined to that act. Criminal statutes are to be accurately and strictly construed, and can not be extended by implication to cases not falling within their terms. *United States vs. Wiltberger*, 5 Wheat., 76, 95–96 (1820); *United States vs. Morris*, 14 Pet., 464, 475 (1840); *Tiffany vs. Bank*, 18 Wall., 409, 410 (1874); *Texas vs. Chiles*, 21 Wall, 488, 491 (1875); *Lewis vs. United States*, 92 U. S. 618, 621 (1875); *United States vs. Reese*, 92 U. S., 214, 220, 221 (1875); *United States vs. Chase*, 135 U. S. 255, 261 (1890); *Sarlls vs. United States*, 152 U. S., 570, 575 (1894); *France vs. United States*, 164 U. S., 676, 682–683 (1897). The Revised Statutes, Section 2865, as amended February 27, 1877, 19 Stat. at L., 247, can not, by implication, be construed to include a part of another statute passed some three years prior thereto, especially when such prior act contained an interpreting clause expressly limited to itself. If Congress intended to apply the same meaning to the act of February 27, 1877, it was easy to say so, and insert words to that effect.

It is next contended by the learned Assistant Attorney-General that if there were no smuggling the evidence makes out a case of "clandestinely introducing." No definition is attempted by him of the words "clandestinely introduce." As already stated (this brief, pp. 51–52), the ordinary meaning of the word "clandestine" means to withdraw from public notice for an evil purpose; the word "clandestinely" in a secret manner; the word "introduce," to bring in; the word "smuggle" means to secretly bring in; and the words "clandestinely introduce" mean to secretly bring in. Both terms, therefore, taken in their ordinary or popular sense, seem to

be synonymous. But the word "*smuggle*" has a well-defined technical meaning (this brief, p. 66); and, therefore, the words, "clandestinely introduce," should be given the same technical meaning as the word "smuggle," because they have the same popular meaning, and are used together. In *Swearingen vs. United States*, 161 U. S., 446 (1896), defendant was indicted for a violation of the Rev. Stat., Section 3893, which enacts that "that every obscene, lewd *or* lascivious book . . . are hereby declared to be non-mailable matter," etc. The indictment alleged that the newspaper article in question "was obscene, lewd, *and* lascivious." It was urged that the indictment was bad for duplicity, but *Mr. Justice Shiras* said (at p. 450):

"If each adjective in a statute described a distinct offense, then these counts would be bad for duplicity, and the defendant's motion in arrest of judgment for that reason ought to have been sustained. We, however, prefer to regard the words, "obscene, lewd, or lascivious," used in the statute as describing one and the same offense. That was evidently the view of the pleader and of the court below, and we think this is an admissible construction."

Mr. Justice Shiras and the concurring justices sustained the indictment, but reversed the judgment upon other grounds. Therefore, the learned Justices who dissented from the reversal concurred in that part of the opinion quoted.

In order to give full force and effect to both Section 2865 and Sections 2806, 2809, 2811, 2814, and 3082, it is proper to construe the words, "clandestinely introduce," found in Section 2865, not to include the offenses enumerated in Sections 2806, 2809, 2811, 2812, 2814, 3082, etc.

It is argued that when a captain of a steamer omits goods from the manifest that the importation is clandestine. The omission from the manifest is a distinct offense under Sections 2811, 2812 and 2814 of the Revised Statutes. Section 2865, as amended February 27, 1877, does not make it as an offense to "*import* clandestinely," but to "*introduce* clandestinely." If Congress intended by the act of February 27, 1877, amending

Section 2865, to punish "clandestine *importation*," it would have used the word "import," instead of the words "clandestinely introduce." It is again argued, that when goods are omitted from the manifest and the vessel enters a port, they are clandestinely introduced. This is equivalent to the other contention, because the entering of a port with an intent to unlade is an importation.

This is a criminal statute and is to be strictly construed. When Congress spoke in the act of February 27, 1877, amending Section 2865 of the Revised Statutes, it did not say "smuggle into a port of the United States," or "clandestinely introduce into a port in the United States;" but "clandestinely introduce *into the United States*." Irregularities in all the other respects were covered by the provisions as to manifests, invoices, entries, and importing contrary to law. They pertain to the port, the coming into the port, the importation. The crime of "smuggling, or clandestinely introducing," is an offense which arises *after* the vessel comes into port, and the importation of the goods thereon was complete. The act of February 27, 1877, 19 Stat. at Large, 247, amending Section 2865, Rev. Stat., provides against *smuggling or clandestinely introducing without paying the duty*. As the obligation to pay duty does not arise until *after* the importation is complete, the words *smuggle or clandestinely introduce* refer to acts after the obligation to pay duty arises. In the case at bar, nothing was done, there was no overt act, after the importation was complete, the diamonds having been seized by Revenue Officer Gallen before any steps could be taken by Captain Loesewitz. (This brief, pp. 68–70.) Statutes are to be construed according to their expressed meaning: *Lake County vs. Rawlins*, 130 U. S., 662, 670 (1889); *Woodbury vs. Berry*, 18 Ohio St., 456 (1869); in connection with the language with which they are used: *Pennington vs. Coxe*, 2 Cranch, 33 (1804); their subject matter: *Silver vs. Ladd*, 7 Wall. 219 (1868); Black on Interpretation, 125; Sutherland Statu-

tory Construction, Sec. 219, p. 209; Wilberforce Statute Law (English Ed., 1881), 175–176; Maxwell on Interp. (3d Eng. Ed., 1896), 74; and full force and effect is to be given to all their provisions by limiting the language of each provision: *Washington Market Co. vs. Hoffman*, 101 U. S., 112, 116 (1879); *Bernier vs. Bernier*, 147 U. S., 242, 246 (1892); *Seymour vs. Ry. Co.*, 44 Ohio St., 12 (1886); *Kemper vs. Campbell*, 44 Ohio St., 210 (1886). An application of these rules to these statutes, and applying them to the facts of the case, fail to show a crime of "smuggling and clandestinely introducing into the United States," no matter what other crimes may be shown and established by the evidence.

Be this as it may, the Court clearly erred in its answer to request for instruction No. 10, when the Court said (original record, p. 207; printed p. 112), that "the jury shall be fully convinced . . . that the defendant is guilty of the *smuggling* charged as testified to by Captain Loesewitz, and that if it is *so* convinced, . . . it will be justified in finding a verdict *of guilty generally*, and should do so. If not *thus* convinced, the defendant is entitled to an acquittal." In other words, if the jury found the defendant guilty of *smuggling*, there would be no alternative but to find the defendant guilty of "*clandestinely introducing*." The learned trial Court seemed to thus treat the words as synonymous, a construction now attempted to be repudiated by the learned Assistant Attorney-General. The learned Assistant Attorney-General contends that the words "clandestinely introduce" have a broader meaning than the word "smuggle." Whether this be true or not, if they have a different meaning, it is clearly error to tell the jury that if they find a man guilty of one crime, they must necessarily also find him guilty of another, although the two are different, and the evidence is insufficient to find him guilty of the crime named in the charge to the jury. Such a doctrine would be fraught with the gravest dangers, and, carried to its logical consequences, would visit the death penalty for a simple assault and battery.

Revised Stat., Sec. 2865, as amended February 27, 1877, 19 Stat. at Large, 247, first appeared as Section 19 of the Act of August 30, 1842, 5 Stat., 565. Rev. Stat., Sec. 3082, first appeared as Section 4 of the Act of July 18, 1866, 14 Stat. at L., Chap. 201, p. 178, p. 179. It is claimed by the learned Assistant Attorney-General that Section 4 of the act of July 18, 1866, 14 Stat., 179, repealed Section 19 of the act of August 30, 1842, by implication. In this he is clearly in error, because Section 4 is directed against "*importing contrary to law*," while Section 19 is directed against "*smuggling and clandestinely introducing into the United States.*" It is a well-known rule of construction that one statute does not impliedly repeal another, unless the two statutes cover the same subject matter and are clearly, explicitly, and directly repugnant to each other. *United States vs. Greathouse*, decided by this Court April 19, 1897, and reported in advance sheets No. 14, page 755; *United States vs. Healey*, 160 U. S., 136, 147 (1895); *Frost vs. Wenie*, 157 U. S., 46, 58 (1895); Black on Interp., 112; Sutherland on Stat. Con., 179–180; Wilberforce Statute Law (English Ed., 1881) 310; Hardcastle Construction of Stat. (2d English Ed., 1892) pp. 345–346; Maxwell on Interp. (3d English Ed., 1896) 214, 255. It is possible, as contended, under express provision of Rev. Stat., Section 5596, that Sec. 19 of the act of August 30, 1842, 5 Stat., 565, was impliedly repealed, because a part of Section 19 was retained in the revision as Section 2865. That Section 4 of the act of July 18, 1866, 14 Stat. at L., 178, Chap. 201, now Section 3082 of the Rev. Stat., meant something different from Section 19 of the act of August 30, 1842, 5 Stat. at L., 565, is clearly apparent from the fact that on February 27, 1877, Congress passed the act found in 19 Stat. at L., 247, Chap. 69, which restored Section 19 of the act of August 30, 1842, 5 Stat. at L., 565, as Section 2865 of the Rev. Stat. of the United States. While it is true that the Revised Statutes of the United States, containing Section 5596, was approved by the President of the United States on June 22,

1874, the same day that the Anti-moiety Act, 18 U. S. Stat. at L., Chap. 391, p. 186, received his approval, the Anti-moiety Act constitutes no part of the revision and the two were not voted on together by Congress. Even if it were proper to give the word "smuggle" the definition contained in the proviso to Section 4 of the Anti-moiety Act, the evidence does not make out an offense, because there was *no act* of passing the diamonds into the United States without passing them through the custom house, or passing them into the United States without submitting them to the officer of the revenue for examination. The Anti-moiety Act specifies that it is "*the act*" of getting goods past the custom house without passing them through the custom house; or "the act" of getting the goods past the officer of the revenue without submitting them to him for examination. The evidence shows no such "act."

To give the Anti-Moiety Act the construction contended for, it would be necessary to read it without the words, "*acts with*," and it would read "smuggling shall be construed to mean the intent to defraud," instead of "*the act* with intent to defraud," etc.

It was earnestly contended by the learned Assistant Attorney-General that the goods were imported, and that if imported they were smuggled or clandestinely introduced. This conclusion does not follow. In his brief he asks the question, "Were the goods imported?" and, having argued that the goods were imported, asserts that, therefore, the case is one of smuggling. Smuggling is not the only offense against the revenue laws. Among the long list of offenses against the revenue laws (some of which we have set out, ante p. 67) is the offense known as "*importing* contrary to law." This crime is founded on Section 4 of the Act of July 14, 1866, 14 Stat. at L., Chap. 201, p. 179, now Section 3082 of the Revised Stat. of the United States. It is a settled rule of construction that full force and effect is to be given to all the

provisions of the law, and when necessary general language of one section is to be restricted so as to give full force and effect to the language of other sections. In order, therefore, to give full force and effect to Section 3082 and Section 2865, as amended February 27, 1877, all violations of the statutes in reference to "*importing*" would be included within and be covered by Section 3082. *Washington Market Co. vs. Hoffman*, 101 U. S., 112, 116 (1879); *Bernier vs. Bernier*, 147 U. S., 242, 246; (1893); *Seymour vs. Ry. Co.*, 44 Ohio St., 12 (1886); *Kemper vs. Campbell*, 44 Ohio St., 210 (1866).

In one of the cases cited (*Seymour vs. Ry. Co.*, 44 Ohio St., 12) plaintiff sued defendant railway company, for killing domestic animals by reason of want of a fence required by statute. The question was whether the action was barred in four or six years. Section 4981 of the Rev. Stat. of Ohio placed a six-year limitation on liabilities created by statute. Rev. Stat., Sec. 4982, placed a limitation of four years on all torts. *Johnson, J.*, said (p. 19) that:

"These two sections must be construed together so as to give each force. If we should say that this cause of action came under Section 4982, we would be compelled to hold that it was not a liability created by statute, or that both four and six years applied to it; but by holding as we do, that Section 4982 applies to injuries and wrongs to person or property other than those to perform a statutory duty, we give force and effect to both sections. This statute requiring railroads to be fenced, and making them liable for damages to personal property by reason of such failure, creates a statutory liability which is barred in six years. While Section 4982 is given full force by limiting it to common-law liabilities for wrongful acts, neglect, or default, such a construction harmonizes and gives full force to both sections."

The same court, in *Kemper vs. Campbell*, 44 Ohio St., 210 (1886), gave full force and effect to both Sections 4133 and 4134 of the Revised Statutes of Ohio, by limiting the word "mortgage," in Section 4133, to one which was a mortgage on its face, and limiting the word "incumbrance," contained in Section 4134, to a mortgage which was not such on its face.

Applying these rules, it is clear that the argument of the learned Assistant Attorney-General would be entitled to weight if it were directed to show that plaintiff, Mr. Herman Keck, was guilty under Section 3082 of "*importing* contrary to law." But the first count of the indictment was based on Section 3082, and as we have shown (this brief, pp. 23–26), and as was conceded on oral argument and on brief by the learned Assistant Attorney-General, this count is fatally defective, and a conviction can not be sustained; and if the evidence would sustain a conviction under Section 3082, and the count of the indictment based thereon was fatally defective, a verdict can not be sustained under Section 2865, as amended February 27, 1877, which the evidence does not fit.

If, for the sake of argument, it be conceded that the word "import" means to bring goods, wares, and merchandise into a port of the United States with intent to land them, and it be further conceded the diamonds charged in the second count of the indictment were brought within the port of Philadelphia with intent to land the same and with the further intent to defraud the revenue of the United States, it does not follow that the defendant is guilty under the act of February 27, 1877, 19 Stat. at L., 247, amending Rev. Stat., Section 2865. Under the act of March 2, 1799, 1 Stat. at L., 646, Section 24, to import goods, wares, and merchandise into the United States, with no bill of lading, no invoice, and no manifest, with intent to defraud the revenue of the United States was clearly unlawful. But the penalty was forfeiture of the goods and the payment of an amount equal to the value of the goods. But this was the only penalty. It was never contended that such a state of facts constituted smuggling or clandestinely introducing into the United States. In the case of *United States vs. 10,000 Cigars*, 2 Curtis, 436 (1855), it appears that cigars were put aboard a vessel in Cuba without bill of lading, invoice, or manifest, with the intent that the master would smuggle them and deliver them to Mr. Davis

at Portland. On the arrival of the vessel the cigars were seized. The question was, whether the goods had been imported into the United States. This was a case of importing contrary to law, and the penalty for this conduct was the forfeiture of the cigars and the payment of an amount equal to their value. It was not until the act of July 18, 1866, 14 Stat. at L., Chap. 481, p. 179, Section 4, now Section 3082 of the Revised Statutes, that a penalty of fine or imprisonment, or both, was imposed for this offense. When Congress came to pass the act of February 27, 1877, 19 Stat. at L., 247, as a part of Section 2865, Revised Statutes (and thus restore Section 19 of the act of August 30, 1842, 5 Stat. at L., p. 565), it was easy for Congress, if it intended to punish acts of irregular importing, to have expressly said so. The word "import" had a well-defined meaning, and if Congress intended to punish "importing with intent to defraud the revenues of the United States," it would have used the word "import" instead of the words "smuggle or clandestinely introduce." It is not to be presumed that Congress would pass a law, in 1877, upon a subject which had been legislated upon in 1866, appeared as a part of the revision of 1874 as Section 3082, and was in full force and effect in 1877, is still in full force and effect, and on which the fatally defective first count of the indictment is predicated. Congress is not presumed to do a vain thing. Even if it be conceded that the Government had the right to seize the diamonds, and forfeit them to the United States, because imported with intent to defraud the revenue, it does not follow that they were smuggled or clandestinely introduced. At most there was an unexecuted intention to smuggle and clandestinely introduce.

The contentions of the learned Assistant Attorney-General can only be sustained by adopting a rule that there are constructive crimes, that a criminal statute may be construed to cover cases not falling within its terms, and that conjecture can be substituted for interpretation. The following, from Lieber's Hermeneutics, 9, is in point:

"The idea, involved in the term interpretation, that we have to discover the true meaning of signs, and represent it to others, implies, likewise, that we proceed in doing so on safe ground, according to rules established by reason, and not arbitrarily or whimsically. On this account, interpretation, and, as will be seen in the sequel, construction, are distinct from conjecture."

In the case at bar, it was impossible to violate the provisions of the act of February 27, 1877, 19 U. S. Stat. at L., 247, amending Section 2865, Rev. Stat., because it is an essential element of that crime, is that the goods must have been such, as to which there was a legal obligation to procure an invoice (this brief, pp. 56–59). If, therefore, there was no legal obligation to have an invoice, then no conviction can be sustained under Section 2865, Rev. Stat., as amended February 27, 1877, 19 Stat. at L., 247. *United States vs. Nolton*, 5 Blatchford, 427 (1867). By Section 4 of the act of June 10, 1890, 26 Stat. at L., 131, no invoice is required where goods are imported which are "personal effects accompanying a passenger." The word "effects" means goods, movables, or personal estate; the word "personal" means pertaining to a person, movables, chattels; the words "personal effects" mean movables, or chattels; the word "accompanying" means going with; the word "passenger" means one who is making a passage. In the case at bar, the diamonds were personal effects; the diamonds accompanied Captain Loesewitz; and Captain Loesewitz was a passenger. Therefore, there being no legal obligation to have an invoice, there could be no violation of the act of February 27, 1877, 19 Stat. at L., 247, *United States vs. Nolton*, 5 Blatchford, 427 (1867). If it be said that Frank Loesewitz was Captain of the steamer Rhynland, and, therefore, does not come within the language of this Section, that argument fails, because he did not cease to be a passenger by being a Captain. To construe the word "passenger" to exclude a person, who, being not only a passenger, but something else, to wit, a captain, would lead to absurd conse-

quences, because such construction would require a Captain, who is as well a passenger, to invoice personal effects, which, when accompanying any other passenger, it would not be necessary to invoice. The words of a statute must be given their ordinary meaning. *Maillard vs. Lawrence*, 16 Howard 251, 261 (1853); *State vs. Peck*, 25 Ohio St., 26 (1874); *Allen vs. Little*, 5 Ohio, 66 (1831); *Lake County vs. Rollias*, 130 U. S., 662, 670 (1889); and when it is attempted to depart from the express intention of a legislative body, and to give words a meaning contrary to their ordinary import, no construction can be given which leads to absurd consequences. *Lau Ow Bew vs. United States*, 144 U. S. 47 (1892); Black on Interp., 104; Wilberforce Statute Law (English Ed., 1881), 112–113; Hardcastle Construction of Statutes (2d English Ed.) 1892, 100–101; Maxwell on Interpretation (3d English Ed., 1896), 277.

There was a total failure of proof that the package, which Captain Loesewitz claims, in his evidence, was given him in the Café Alsacienne, in Antwerp, January 27, 1896, was the package seized by Revenue Officer Gallen. On the contrary, Captain Frank Loesewitz testified (original record, pp. 77–79; printed, p. 34) that he wrote the address, T. Van Reeth, on that package, and put it in the drawer of his state-room on the steamer Rhynland. Revenue Officer Gallen states that the package seized by him had no address upon it, and this is conceded by the learned Assistant Attorney-General (his brief, p. 7).

The *corpus delicti* fails of identification, and without proof of the *corpus delicti* there can be no conviction. Wharton Criminal Evidence (9th Ed.), Section 325.

The second count of the indictment (original record, pp. 3–4; printed, p. 1) alleges that the statute was violated in 1890. A conviction on such a record ought not be allowed to stand.

Second.—An attempt to smuggle or clandestinely introduce is not alleged. If there be a statute which will punish an at-

tempt to smuggle, an attempt has not been alleged. *State vs. Colvin*, 90 N. C., 717 (1884). It is repugnant to charge one with doing an act, and at the same time say that he attempted to do it. For some offenses attempts are made substantive offenses, such as attempts to commit the crime of murder or manslaughter, under Section 5342 of the Revised Statutes of the United States. In some States statutes have been passed, permitting a conviction for an attempt under an indictment for doing the act. But there are no Federal statutes of that kind, and none in reference to the crime of smuggling.

Revised Statutes of the United States, Section 1035, provides that in all criminal cases the defendant may be found guilty of an attempt to commit the crime charged, *provided such attempt be itself a separate offense.* An attempt to smuggle or clandestinely introduce has never been made a separate offense, punishable by fine or imprisonment, or both. The only plausible ground upon which the learned Assistant Attorney-General can urge that it is proper to consider the subject of an attempt is that the proviso to Section 4 of the Anti-moiety Act of June 22, 1874, 18 Stat. at L., 186, contains the word "attempt." We have shown that the definition in the Anti-moiety Act does not apply to the act of February 27, 1897, 19 Stat. at L., 247, amending Sec. 2865, Rev. Stat. Even if it did, an attempt to smuggle is not made a distinct offense within the language of Sec. 1035 of the Rev. Stat.

Third.—If an attempt to smuggle has been properly alleged, the facts do not make out a case of an attempt. If, for the sake of argument, we take the strongest possible view of the testimony of Captain Frank Loesewitz, there was an unexecuted intention to make an attempt to smuggle; or, at most, a preparation, accompanied with an intention, to make an attempt to smuggle. The acts of preparation were, first, an omission of a Consular invoice, which would be one step; putting the diamonds on ship-board in the state-room at Liverpool, which would be the second step; omitting the

diamonds from the manifest, which would be the third step; steaming the vessel from the port of Liverpool into the port of Philadelphia, which would be the fourth step in the preparation; omitting to deliver a manifest containing the diamonds, which would be a fifth step in the preparation. But here the overt acts cease, and all of the overt acts were but preparatory. Nothing further was done, and the goods remained in the state-room on ship board, where they were first placed in Liverpool, until Mr. Gallen, a revenue officer, who made himself known as such, demanded the goods in his official capacity, and they were delivered up to him in that capacity. Merely because there was the crime of failing to get a Consular invoice, or the offense of omitting goods from the manifest, or the offense of failing to deliver a manifest with the goods thereon, and because said acts constituted an unlawful importation under the provisions of Section 3082 of the Revised Statutes of the United States, and merely because in this case there could be no conviction of importing contrary to law, because the first count of the indictment was badly drawn, would not authorize a conviction for an attempt to smuggle, when, by the over-zeal of the Treasury official, no overt act toward landing the diamonds was done. This is well illustrated in 6 Bacon's Abridgment (5th Ed.), 286, as follows:

"*As the offense of smuggling is not complete* unless some goods, wares, or merchandise *are actually brought on shore*, or carried from the shore contrary to law, *a person may be guilty of divers practices*, which have a direct *tendency thereto, without being guilty of the* offense."

There is a wide distinction between an attempt and an intent. There is a wider distinction between acts constituting an attempt and acts constituting preparation. The Anti-Moiety Act of June 22, 1874, 18 U. S. Statutes at Large, Chapter 391, page 186, defines smuggling *for the purposes of that act* in the following language, to wit:

"That *for the purposes of this act* smuggling shall be construed to mean *the act* with intent to defraud of bringing into the United States, or with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the packages containing the same, through the custom-house, or submitting them to the officers of the revenue, for examination."

Even if we adopt this as a legislative definition of smuggling, and of an attempt to smuggle, the evidence fails to make out a case. The Anti-Moiety Act is the only Federal statute which makes any reference to "*an attempt* to smuggle," and if it be proper to consider the matter of an attempt, we must look to that law.

It appears that *Benedict, J.*, in the case of the *United States vs. Claflin*, 13 Blatchford, 178 (1875), erroneously adopted it as a definition. We have already shown (this brief, p. 80) that at most there was a mere preparation to make an attempt to smuggle without any attempt; an unexecuted intention, and no overt act done beyond the acts of preparation. An attempt is an interrupted act done after the acts of preparation.

The court's special attention was called to this matter by request number five (original record, p. 205; printed, pp. 110–111) in the following language, to wit:

"No. 5. The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same, or putting the same on his manifest, and delivering same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen, said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime

of smuggling, or clandestinely introducing, or attempting to bring in, and as to the crime so charged, your verdict must be not guilty."

The Court refused to give this instruction, to which ruling an exception was taken (original record, p. 208; printed, p. 112), and the same was assigned as number thirteen in the assignment of errors (original record, pp. 218–219; printed, p. 116), and is set forth in the petition for a writ of error (original record, p. 226; printed, p. 119).

The Court should have given this special instruction, and also granted the request for a binding instruction to find the defendant not guilty; and it was clearly error for the Court to charge the jury, that if they believed the statements made by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing to America, that the jury should find the defendant guilty.

There was no interrupted overt act of bringing in of the diamonds from the state-room of the steamer Rhynland, where they had been lying since put there at Liverpool; no interrupted overt act of an introduction of the diamonds from the state-room of the steamer Rhynland, where they had been lying since put there at Liverpool; no moving of the diamonds from said state-room toward the shore, interrupted before reaching the shore. All preparations had been completed, either to bring them in lawfully by passing them through the custom-house, or submitting them to the officers of the revenue for examination, on the one hand; or, of attempting to pass them from the state-room to the shore without passing them through the custom-house, or submitting them to the officers of the revenue for examination, on the other hand. Anti-moiety act of June 22, 1874, 18 U. S. Statutes at Large, Chapter 391, page 186, Section 4, paragraph 2. No overt act had yet been done, no matter how many acts of preparation or what the secret intention.

If, after the steamer Rhynland arrived, a stroke of light-

ning had sunk the ship, it is clear that up to that time there was no smuggling or an attempt to smuggle, although an offense of omitting to have a Consular invoice, or omitting to put the goods on the manifest, may have been committed (this brief, pp. 67–68).

If, after the ship arrived, Captain Loesewitz had changed his mind and concluded either to pass the same through the custom-house, or submit them to the officers of the revenue, or returned them to Europe, it can hardly be claimed that there was smuggling, or an attempt to smuggle. Or if, after the ship had arrived, an officer of the Government should have demanded an examination, and Captain Loesewitz, knowing the officer to be such, should thereupon submit them to the officer in his official capacity, it is clear that there had been no smuggling, and as yet no overt act of an attempt to smuggle. Or, as in this case, the diamonds were lying in the cabin, just as they had been put at the port of Liverpool, and no move made toward taking them from the state-room ashore, there could not be smuggling or an attempt to smuggle, as there was no overt act toward bringing in or introducing, interrupted while being carried out. On the contrary, upon a revenue officer demanding the diamonds, in his official capacity, the Captain went to the state-room, got the diamonds, and they were submitted to the revenue officer for his examinrtion (original record, p. 66; printed, p. 27). What was done comes within the very language of paragraph 2, section 4, of the Anti-moiety Act of June 22, 1874, 18 U. S. Statutes at Large, Chapter 391, page 186, as to acts which do not constitute smuggling or attempting to smuggle. By the language of the Anti-moiety act, *nonaction* is not an offense, but *an act*. We have already had occasion to comment on this (this brief, p. 77). Nor is it to be forgotten that Captain Frank Loesewitz testified (original record, pp. 81–82; printed, pp. 36–37) that he had been in the habit of bringing over small packages in the same way he brought the package in

the case on trial, and after the vessel had been docked he would go to a custom officer on the dock and report the fact, but that in this case he had no time to go on the dock, as the Treasury Agents came aboard before he had an opportunity to go upon the dock.

These principles have been announced and applied in numerous cases. In the case of *People vs. Murray*, 14 Cal., 159, Mr. Chief Justice Field (at p. 159) laid down the following proposition:

"Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made."

So in the case on trial it is clear that all the means and measures for the commission of the offense were completed, and preparations made, but there was no direct movement toward the commission after the preparations were complete.

The case of *Mulligan vs. People*, 5 Parker's Criminal Reports, 105, decided by the General Term of the Supreme Court of New York in February, 1861 (Clerke, Sutherland, and Allen, Justices), is an interesting one as illustrating the difference between acts of preparation and overt acts of attempt after the acts of preparation. It appears that William Mulligan got into a row in a gambling house. Upon being threatened with eviction, drew and pointed an uncocked Colt's revolver at the officer and threatened to shoot. There was no evidence of an attempt to cock the pistol or to pull the trigger. He was prosecuted under the statute which punished every person who should be convicted of shooting at another, or attempting to discharge any kind of fire-arms, with intent to kill, maim, etc. (page 109). At the close of the evidence the Court was requested to charge the jury that the pointing of an uncocked Colt's revolver at a person is not an attempt to discharge the weapon. The Court refused the

request, and the ruling of the Court was assigned for error. *Justice Allen*, who delivered the opinion of the Court, said (page 109) that:

"The question presented is, whether a conviction can be had for an attempt to discharge a pistol when the individual indicted has proceeded no further toward an actual discharge of shooting than to raise and point the pistol, uncocked, at the party threatened. There was no evidence of an attempt to cock the pistol or to pull the trigger, and the jury would have been warranted in finding that the prisoner merely raised the pistol and pointed it at the officer, making the qualified threat before stated. The instruction was properly asked for upon the evidence. *The threat constituted no part of the attempt to discharge the pistol, and was only evidence of the intention of the prisoner.*"

The Court further stated (page 111):

"It is not an attempt to discharge a loaded gun or pistol to put oneself in a situation in connection with the gun or pistol that it may be discharged. A mere getting it in readiness to discharge is not an attempt to discharge it. Upon the trial, an assault with intent to kill was confounded with the specific, statutory, and entirely different offense charged, an attempt to discharge a loaded pistol with the like intent. The act, the attempt to commit which was made an offense, was the discharge of fire-arms. No matter what other offense was committed against the laws, or the person of the officer, if this offense was not committed, the prisoner was wrongfully convicted. It is far from certain that any offense was committed by the prisoner, but of that we are not the judges. We are only to decide upon the present conviction."

The Court again said (at p. 112):

"An attempt is an endeavor to do an act carried beyond mere preparation, but falling short of execution of the ultimate design (Bouvier's Law Dic.). Loading a pistol would be a preparation to shoot, but not an attempt to discharge. So, to get possession of a pistol, to take it from the pocket, and to point it, would be a preparation to discharge it, but not an attempt to discharge it. It may not always be easy to determine where the line is which separates a preparation to perform a given act from an attempt to perform the act. But the act, which is characterized as an attempt, must be proximate to the principal thing to be accomplished, a means to the end, and the pointing of a pistol uncocked is not an attempt to discharge it, punishable under the statute. Fire-arms are usually discharged by drawing a trigger, but they may be discharged in any way by which the powder can be ignited and

made to explode, and the attempts to discharge may be as diversified as the means of discharge are various, but can only be by some act, which, carried out and perfected, will result in a discharge."

In the case at bar the question is, whether Mr. Herman Keck, plaintiff in error, has done an overt act by attempting to smuggle in violation of Section 2865 of the Revised Statutes of the United States, and not whether he did or attempted to violate any other provision of law. *Mr. Chief Justice Field* (at p. 159), in *People vs. Murray*, 14 Cal., 159 (1859).

In *Kelly vs. Commonwealth*, 1 Grant Cases (S. C. Pa.), 484, the defendant was indicted for killing in an attempt to commit rape. The evidence disclosed the killing of a man, and no overt act of force toward the commission of a criminal assault upon his daughter. The Court held that the facts did not make a case for an attempt to commit rape, reversed the conviction because "acts are necessary to constitute an attempt; and an attempt to commit a rape is an ineffectual offer by force to have carnal connection."

It is laid down in *State vs. Wilson*, 30 Conn., 500 (1862), that the overt act charged as constituting the attempt must be such as is in itself adapted to produce the effect intended. In the case at bar such overt act would have consisted in after having gone to the state-room on the steamer Rhynland, where the diamonds had been lying ever since put there at Liverpool, moving them with the intention of not passing them through the custom-house or submitting them to the revenue officers for examination, would have constituted an overt act of attempt. But no such overt act was done or attempted to be done, and, therefore, there was no attempt.

It is not claimed that a conviction could be had for an "*attempt* to clandestinely introduce".(this brief, pp. 82-83). And if it were, a case is not made out on the evidence.

IV.

Evidence Erroneously Admitted.

(1) A person sworn as a witness should be permitted to state only facts as to which he was a percipient witness. If a person claiming to be a percipient witness to facts, declare same to another, the latter, when sworn as a witness, is but a percipient witness to the fact of the declaration, and not to the transaction declared to him. And said declaration is purely hearsay and inadmissible. An exception to this rule arises in cases of declarations made by a conspirator during the continuation of the conspiracy; but declarations made thereafter are hearsay and inadmissible.

(1 a) When a sea captain claims that a stranger to him, in Europe, induced him to smuggle diamonds into America, and said sea captain steamed his vessel into the port of Philadelphia, where the diamonds were seized and the captain arrested by a revenue officer, and a day after the seizure the captain gave to the revenue officer a description of the stranger, who, he claims, gave him the diamonds in Europe, but whose name he did not know, it is not competent upon the trial of said stranger on a charge of smuggling for said revenue officer to give testimony as to the description given to him a day after the seizure of the diamonds and the arrest of the captain. Such testimony is inadmissible, is hearsay, and does not come within the rule of declarations made by a conspirator during the continuation of the conspiracy.

(2) Hearsay evidence is not admissible to corroborate the statements of a witness made upon the stand.

(2 a) A Court admitted hearsay evidence. It was all that could be claimed to be corroborative of the evidence of the person claiming to be the only percipient witness to a transaction. The Court charged the jury, that if they believed the statements under oath of said percipient witness, they must find the defendant guilty, and said part of the charge was duly excepted to. When the Court further charged the jury, that the Government claimed that the percipient witness was corroborated in such manner that it was not only safe to believe but that belief could not be avoided, and that the points of corroboration had been dwelt upon by the District Attorney very fully, and the Court need not further allude to them, such part of the charge is such a plain error, vital to the defendant, that a reviewing court should correct, although not excepted to, or assigned for error, and makes the incompetent evidence especially prejudicial.

(3) When evidence is being adduced during the progress of a trial, a mere general objection is presumed to be to the admissibility of the evidence and not to the competency of the instrument of evidence. Hence, a general objection on the trial will not be considered by a reviewing court as an objection to the competency of a witness, or that an instrument was not properly authenticated.

(3 a) It is a general rule that the ground of an objection to the admissibility of evidence should be stated. The reason of the rule is, that the Court and counsel might not be misled. When the record discloses that the Court is cognizant of the grounds of the objection, the reason of the abstract rule ceases and the record sufficiently discloses the grounds of the objection, and it is unnecessary to repeat the same, and the reason of the rule ceases of application to the concrete case.

(3 b) The record discloses that a question was objected to and the objection sustained on the ground that the evidence was hearsay. This was followed by a second

question, differing only in verbal expression. This question was similarly objected to without specifically stating the ground of the objection. The Court overruled the objection, and an exception was allowed. In such case it was unnecessary to repeat the ground of the objection, because the Court had stated it, and neither the Court nor counsel were misled. In such case the reason of the abstract rule ceased, and the rule ceased of application to the concrete case.

The Court overruled an objection by Mr. Herman Keck, plaintiff in error, to a question put by the District Attorney to the witness, John C. Gallen (original record, pp. 97–98; printed, p. 46). The error arose as follows:

The United States, to maintain the issues on its part, called, among other witnesses, Captain Frank Loesewitz. (Original record, p. 59; printed, p. 22).

As appears from the Bill of Exceptions, the story as told by him is substantially as follows: That he was a native, citizen, and resident of Antwerp, Belgium; by occupation a seafaring man and captain of the steamer Rhynland, plying between Philadelphia and Liverpool. On the 27th day of January, 1896, witness made a social call at the residence and place of business of Mr. Van Hammelrick, in Antwerp, Belgium; Van Hammelrick being a friend of twenty-five years' standing, and the owner of a retail jewelry store. Just as witness was leaving, Mr. Hammelrick came in with a person whom the witness identified in Court as Mr. Herman Keck, the plaintiff in error, and Mr. Van Hammelrick invited witness to go and have a glass of beer. The strange person was introduced, but his name was not given. The three went to the Café Alsacienne, on the Place Verte, sat down at a table, and each ordered a glass of beer. The place was crowded, and there were thirty or forty people about. Mr. Van Hammelrick spoke in Flemish (original record, p. 61; printed, p. 24). While they were sitting there Mr. Van Hammelrick took a small package from his pocket, showed it to witness, and said, "This package belongs to that person here," and Van Hammelrick further said to witness, "Will you oblige me to take that over to America? It belongs to him; it be-

longs to that gentleman; he's a customer of mine; it does not contain any valuables." Witness asked the stranger, "Where shall I send it to?" The stranger tore a piece of paper off a card lying on the table and put an address on it. The name on it was T. Van Reeth, Fourth Street, Cincinnati — either No. 21 or 24, and witness thought 21. Witness put the package and paper in his pocket, and after being at the café a quarter of an hour, the three separated on Place Verte, where Mr. Keck told witness to send the package by Adams Express. Witness sailed from Liverpool on January 29, and put the package in his state-room and the paper in a card case in his pocket. Witness wrote a name on the package he received and put it aboard the ship in Europe (original record, p. 78; printed, p. 34); but the package seized had no address on it (original record, p. 94–95; printed, p. 44). When the Rhynland reached the port of Philadelphia, the following took place, as testified to by the witness Captain Frank Loesewitz (original record, p. 66; printed, p. 27).

"Two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, 'yes.' I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were Treasury agents; and said, 'Captain, that is a package of diamonds you have got, to be sent to Cincinnati,' and if I didn't deliver it I would be arrested. After awhile I went down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened."

The witness further testified (original record, pp. 81–82; printed, pp. 36–37) that he had been in the habit of bringing over small packages in the same way he brought this package; and that, after the vessel had been docked, he would go to a custom officer on the dock and report the fact. In this case he had not had time to go on the dock, as the Treasury agents came aboard before he had time to go upon the dock.

The witness further testified (original record, p. 82; printed, p. 37) that he had never heard of Mr. Keck; did not recall his

name; and the first time he knew his name was when Mr. Gallen, the Treasury officer, came on board of the ship. The witness testified that he had no recollection of the name "Keck;" and if Mr. Gallen had said "Johnson," witness would not have known the difference (original record, p. 83; printed, p. 37), and all witness knew was the man's face, and that he could not identify him by his name at all, but by his face.

The following illustrates a part of this testimony (original record, p. 83; printed, p. 37):

Q. "You did not identify him by his name at all, did you?"
A. "No, not by his name. I identified him by his face."

Herman Keck, plaintiff in error, did not sail on the "Rhynland;" was never on the "Rhynland;" and was not at Philadelphia. Herman Keck, the plaintiff in error, arrived in New York from Europe on the steamer "Aller," at Hoboken, New Jersey, about the 14th of February, 1896 (original record, p. 98; printed, p. 46).

Herman Keck's testimony is a direct and categorical denial of the testimony of Captain Frank Loesewitz (original record, pp. 179–197; printed, 95–107).

The United States, to further maintain the issue upon its part, called as a witness Mr. John C. Gallen (original record, p. 92; printed, p. 43).

Among the questions asked by the United States District Attorney, and objected to by Herman Keck, plaintiff in error, which objection being overruled by the Court, he then and there excepted (original record, pp. 97–98; printed, p. 46), was the following, to wit:

Q. "Did the Captain give you a description of the man who gave the diamonds to him?"
(Objected to. Objection overruled. Exception allowed for defendant.)
A. "Yes, sir."
Q. "What was the day when he gave you the description?"
A. "The day after I seized the diamonds."

This action of the Court was assigned for error as number five in the assignment of errors (original record, p. 213; printed, p. 114), and has already been set forth in our statement of the case (brief, pp. 7–10).

This ruling raises the question, whether the witness, Mr. John C. Gallen, should have been permitted to detail upon the witness stand declarations made by Captain Frank Loesewitz, one day after the seizure of the diamonds and the arrest of said Captain Loesewitz. It comes within the hearsay rule, and within none of the exceptions thereto. It was proper enough when Captain Loesewitz was upon the witness stand, claiming to be the percipient witness to an alleged transaction in the Café Alsacienne, to give a descripiion of the person with whom he claimed to have had the transaction. It would have been competent for a person knowing Mr. Herman Keck, plaintiff in error, to state from the witness stand Mr. Keck's appearance, as a percipient witness thereto. In the instance first mentioned Mr. Gallen's testimony would be but a repetition of what Captain Loesewitz said to the witness, and the witness Gallen was a mere percipient witness to the conversation, and not to a description of Mr. Keck. The statement by Captain Loesewitz of such description to witness Gallen, and detailed by Mr. Gallen on the witness stand, was hearsay evidence, and a mere self-serving declaration on the part of witness Loesewitz to Gallen. Best's Principles of Evidence (Chamberlayne's Ed., 1883), Section 492, Note (1). Such hearsay is inadmissible, and there is no rule or principle of the law admitting it. Mr. Herman Keck, plaintiff in error, positively denied meeting Captain Frank Loesewitz. It would be a strange rule to allow Captain Loesewitz, after testifying on the witness stand to a description of Mr. Herman Keck, to claim to corroborate that statement as truth by showing by the witness Gallen that he had told the same story to others; especially as the story told by Captain Loesewith, both on and off the stand, was claimed by Mr. Herman

Keck to be a falsehood. If that testimony be admissible, it would have been competent for Mr. Herman Keck, plaintiff in error, to have called a hundred persons to testify that he had stated to them that he did not know Captain Loesewitz, for the purpose of corroborating his testimony upon the witness stand, that he had not met Captain Loesewitz. Nor is the objection removed by the fact that the learned District Attorney put a leading question. This evidence is especially prejudicial, as Captain Loesewitz testified that he did not know Mr. Keck by name; had no recollection of the name "Keck," and if Revenue Officer Gallen had said "Johnson," the witness would not have known the difference; that all the witness knew was the man's face, and that he could not identify him by his name (original record, p. 83; printed, p. 37). A name being but one means of identification, it would have been clearly incompetent to have some one detail from the witness stand a conversation had with Captain Loesewitz one day after the seizure of the diamonds, wherein Captain Loesewitz described Mr. Keck by name; it was equally incompetent to describe him in some other way. *Commonwealth vs. Riker*, 131 Mass., 581–582 (1881); *Rose vs. State*, 13 Ohio Circuit Court Reports, 342, 348–9 (1896); *Lucas vs. United States*, 163 U. S., (1896).

In *Rose vs. State*, 13 Ohio Circuit Court Reports, 342 (1896), defendant, John Rose, was indicted for killing Clara Seigler, May 30, 1895. An exception taken to the admission of certain evidence was duly assigned for error. This assignment of error was sustained, as appears from the following quotation from the opinion of *Burrows, J.* (at pp. 345–349), to wit:

"The whereabouts of the prisoner was shown on the night of the homicide by different witnesses up until a quarter of twelve o'clock, or half past eleven. From that time he is not seen again until morning, unless he was seen by Margaret Maloy.

"As I understand the evidence, shortly after twelve o'clock

she was wakened up by her little girl, who was ill, and wanted some water. She got up for the purpose of going out to the hydrant, on the street. As she went to the yard fence, she saw some one coming, when she retreated into the house. At that time she did not recognize the person who was coming. She nearly closed the door, keeping her foot against it. She says she then recognized the person passing by as being John Rose, the prisoner. After he had passed she went out and obtained the water; and shortly after her return to the room she told her daughter who the man was whom she had seen.

"Her daughter, Annie Maloy, a girl thirteen years of age, is called to the stand. She was permitted to testify that her mother, after she came back into the house, told her who the man was.

"It was important for the State to show, if it could, that at the time Margaret Maloy went to the door, this prisoner was seen coming from the direction of the place of the homicide, and going towards his stable.

"Did she on that night recognize John Rose? She says that she did, and that she told her daughter that night who it was. And to corroborate such statement the daughter is permitted to testify that her mother told her that night who it was.

"* * * * it comes simply to this, that the state was putting in, by the mouth of another, the declaration of Mrs. Maloy, not under oath, to support the statement under oath.

"This evidence, in our opinion, was incompetent, and its admission error."

The very zealous and able District Attorney, who prosecated this action, desired to use this evidence of witness Gallen for the same purpose condemned in the *Rose Case*, as appears from the brief (p. 30) of the learned Assistant Attorney-General:

"The important fact was not that Keck's appearance was so-and-so, but that the Captain had stated it to be so-and-so. It will be remembered that he was unable to remember Keck's name. His ability to describe Keck's appearance was, therefore, of very great weight as confirming the accuracy of his own story."

It was clearly hearsay to permit witness Gallen to detail on the witness stand declarations made to the witness by Captain Loesewitz one day after the seizure of the diamonds and the arrest of Captain Loesewitz, to corroborate Captain Loesewitz's statements made on the witness stand.

In *Commonwealth vs. Ricker*, 131 Mass., 581 (1881), the defendant was indicted for breaking and entering a building at Danvers, Massachusetts, April 11, 1881. On the trial the State called Sergeant of Police Blinn, who testified as follows:

"On the fourth day of said April, Officer Pallock virtually reported to him that he had seen the defendant in the street that night."

This evidence was admitted by the Court "for the purpose of proving the date," over the objection of the defendant. The defendant having been convicted, this ruling of the Court was assigned for error. In sustaining the exception, *Lord, J.*, said (p. 582):

"The date of what? If the 4th of April were a date material to any issue in this case, that materiality does not appear by the bill of exceptions. It is obvious, however, that its materiality consisted, if in anything, in the fact that the defendant was in Salem on that day, and it would be a strange perversion of the rules of evidence to say that incompetent and hearsay evidence of the existence of a fact is admissible in order to fix the date when the facts related in the incompetent and hearsay evidence occurred. *Robinson vs. Litchfield*, 112 Mass., 28. Hearsay evidence is never competent to prove the existence of a fact, except in particular and exceptional instances, having no relation to the question before us. It is the introduction of some fact by the recital of a third person, without the sanction of an oath. This testimony introduces into the case the fact that the defendant was in Salem on April 4th, which fact is supported by no person's oath. References to conversation, or to any transactions *inter alios*, which may be referred to for the fixing of a date, are commonly in the nature of facts which enable the witness to swear affirmatively. In this case, if Officer Pollock had sworn that he saw the defendant in the street at some time, and had made the report at that time to Blinn, and that he had made but one such report, but was wholly unable to fix the date of it, it would have been competent for Blinn to fix the date by a reference to his minutes, or in any other mode to fix the precise time of the transaction, and no rule of law would have been violated. As it now stands, the fact that the defendant was in Salem on that day is in the case without the sanction of an oath."

In *Lucas vs. United States*, 163 U. S., 612 (1896), Lucas was indicted for murder at the Choctaw Nation, in the Indian Country, of Levy Kemp, "a negro, and not an Indian." Cer-

tain evidence was offered and objected to by defendant as hearsay, and the ruling of the Court in admitting it was assigned for error. In sustaining the assignment of error, and holding that the evidence was inadmissible, *Mr. Justice Shiras* said (p. 617), that:

"But we are of opinion that the evidence put in by the government, on this question, was not competent. It consisted of statements alleged to have been made by the deceased, in his lifetime, to le Flore, the witness, that he did not belong to the Indian country, but had come from Arkansas. Such statements do not come within any rule permitting hearsay evidence. The trial judge appears to have regarded the testimony as within the rule that declarations of deceased persons made against their interest are admissible — that as a colored man adopted in the Choctaw Nation gets benefits, rights, and privileges, a declaration made by him against that interest would be competent. It may be that, in a controversy on behalf of a deceased negro's right, or that of his representatives, to participate in the property of the nation, such admissions might be competent. But this case is not within any such rule. The object of the evidence here was not to enforce any rights or claims of the deceased against the Choctaw Nation, but was to sustain an allegation in an indictment, upon which the jurisdiction of the United States Court depended."

A well-recognized exception to the rule against hearsay is, that *while a conspiracy exists*, the declaration of one co-conspirator in furtherance of the common design are admissible against his associates. 2 Wharton Evidence (3d Ed.), Sec. 1205. But a narrative after the conspiracy is terminated, is inadmissible. 2 Wharton Evidence (3d Ed.), Sec. 1206. If there were a conspiracy between Captain Frank Loesewitz and Mr. Herman Keck, that conspiracy had been terminated by the seizure of the diamonds by Revenue Agent Gallen. A full day elapsed after the seizure, and before the declaration offered in evidence, was made.

The rule governing the reversal of cases for the wrongful admission of evidence is admirably stated in the case of *Boston and Albany Railroad Company vs. O'Reilly*, 158 U. S., 334 (1895), by *Mr. Justice Shiras* (at p. 337), as follows:

"If the record disclosed no other error, the admission of this evidence might have been passed by as immaterial. Still, it is impossible to say that the defendant's case was not injuriously affected by the admission of the evidence, and, while an Appellate Court will not disturb a judgment for an immaterial error, *yet it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting*. *Deery vs. Gray*, 5 Wall, 795, 807; *Gilmer vs. Higley*, 110 U. S., 47."

The same rule is laid down in the case of *Commonwealth vs. Ricker*, 131 Mass., 581, 583 (1881), a case of the wrongful admission of hearsay evidence touching a question of identification upon a certain day. *Lord, J.*, said (at p. 583) that:

"We do not deem it necessary to discuss the question raised at the bar, that this testimony could not have harmed the defendant, because it was wholly immaterial, upon the ground that the offense was charged as having been committed upon the 11th, and this evidence related to the 4th. It must, however, be remembered that the Government insisted upon the introduction of this evidence, notwithstanding the objection of the defendant to its competency, that incompetency *prima facie* is apparent, and it would not be a harsh rule to require of the Government to show affirmatively that incompetent evidence, which it had insisted upon introducing against the objection of the defendant, was harmless.

"We think, however, not only that the bill of exceptions does not show that the evidence was harmless, but it does show that it might have been extremely hurtful. On recurring to the bill of exceptions, there is nothing to show the time when the defendant contended that his absence from the State began. Although it is consistent to suppose it began on the day on the night of which the offense was committed, yet it is equally consistent with the bill of exception to suppose it dated back several months before the commission of the offense, and this latter view explains what is otherwise inexplicable, the persistency with which the Government, against the defendant's objection, claimed the admission of a narrative which was incompetent."

The danger arising from the admission of hearsay evidence is well stated in *Queen vs. Hepburn*, 7 Cranch, 290 (1815), by *Mr. Chief Justice Marshall* (pp. 295–296):

"It was very justly observed by a great judge that 'all questions upon the rules of evidence are of vast importance to all orders and degrees of man. Our lives, our liberty, and

our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.'

"One of these rules is, that hearsay evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony, which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness; its incompetency to satisfy the minds of the existence of the fact, and the fraud which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible. . . .

"The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule, the value of which is felt and acknowledged by all."

In view of what this learned jurist has said upon the subject of hearsay evidence, it is hardly to be supposed that this Court, will say that this evidence was "not intrinsically unfair, and not such as the rules of evidence were especially intended to bear out." (Supp. brief, *Mr. Asst. Atty.-Gen. Whitney*, p 5)

This error was especially material and prejudicial, because there was oath against oath, and anything, no matter how slight, may have wrongly turned the scales against the defendant.

The Court, having once made its ruling that testimony of this character was competent, it was hardly the province of, or becoming to, an advocate, to keep on objecting every time the District Attorney offered similarly incompetent testimony. An advocate has a duty to perform, and nothing so seriously prejudices a case before a jury as constant unavailable objections and noting exceptions. An objection was made by Mr. Herman Keck, plaintiff in error, the objection overruled, and an exception taken. The Court having opened up this sluice-way, the learned District Attorney poured in upon the case great volumes of similarly incompetent testimony. This evidence is clearly prejudicial, and it does not appear beyond

a doubt that it was not and could not have been prejudical to Mr. Herman Keck, plaintiff in error.

It is hardly an answer for the learned Assistant Attorney-General to say that there was other incompetent evidence introduced and not objected to. An error not objected to does not cure an error duly objected to.

This very incompetent and illegal testimony was the chief reliance of the District Attorney in his argment for corroboration; and it pierced the defendant like a dagger when, after allowing this kind of hearsay evidence to be admitted, and the District Attorney had claimed in his argument that it corroborated the witness, Frank Loesewitz, to charge the jury (original record, p. 209; printed, p. 112), as follows:

"The Government claims, however, that the Captain is corroborated in important particulars, and in such manner that it is not only safe to believe him, but that belief can not be avoided. The points of corroboration and the matters on which they depend have been referred to and dwelt upon by the District Attorney very fully, and I need not further allude to them."

And for the Court to make this incompetent and illegal hearsay doubly prejudicial it had but to add (original record, p. 208; printed, p. 112) that:

"It is sufficient to say in this respect that if the statements made here, under oath, by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here, are true, the defendant is guilty of the offense charged."

If it be said that the part of the charge first here quoted was not excepted to and assigned for error, yet it is that kind of a plain error, vital to the defendant, which this Court always corrects. *Wiborg vs. United States*, 163 U. S., 632, 633 (1896).

That part of the charge, secondly quoted, was duly excepted to (original record, pp. 209–210; printed, p. 113) and assigned for error as number seventeen in the assignment of errors (original record, p. 222; printed, p. 118). The Court reiter-

ated this error in its answer to request number ten for a special instruction (original record, p. 207; printed, p. 112), which answer was duly excepted to (original record, p. 208; printed, p. 112) and assigned for error as number sixteen in the assignment of errors (original record, p. 221; printed, pp. 117–118).

The learned Assistant Attorney General relies on *Insurance Co. vs. Mosley*, 8 Wall., 397, 399, 404 (1869), and case cited at p. 407, and 1 Wharton on Evidence, Sec. 261. These citations, instead of sustaining, destroy the position assumed. In *Insurance Co. vs. Mosley*, a divided court held admissible declarations which pertained to bodily injury, with the caution that the limitations of the doctrine must be carefully observed in its application. *Mr. Justice Swayne* said (at p. 405) that:

"Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, and not to the past. *Anything in the nature of narration must be excluded.*"

In *Eastman vs. R. R. Co.*, 165 Mass., 342, 342 (1896), an offer of evidence to prove what an injured employe said as to how an accident happened, five minutes thereafter, was held to have been properly rejected as hearsay evidence. *Allen, J.*, said (p. 343):

"The statements by the plaintiff were simply a narrative of what had happened, and were not admissible as part of the *res gestæ*."

It was contended by the learned Assistant Attorney General, that it was within the discretion of the court to admit hearsay evidence. The evidence was distinctively inadmissible according to the well known rules of evidence, and it is not within the discretion of the Court to violate those rules.

It was next contended that the objection to this evidence was in bad form. The only object in stating a ground of objection is, to call the attention of the Court to the reason of its claimed inadmissibility. On the same page of the record, the learned trial judge, in sustaining an objection

to the preceding question, stated very fully the reasons of its incompetency, as follows (original record, p. 97; printed, p. 46), to wit:

Q. What took place next day?
A. The next day he called at my office, and I asked him if he had any explanation to make.
(Objected to.)
The Court: His declarations can not be used against the defendant. What this man said when the diamonds were first found upon him might be evidence as part of the *res gestæ*, and it would be safe to admit it, but what he said afterward certainly is not evidence against this defendant.
By the District Attorney:
Q. Did the Captain give you a description of the man who gave the diamonds to him?
(Objected to.)
(Objection overruled.)
(Exception allowed for defendant.)
A. Yes, sir.
Q. What was the day when he gave you the description?
A. The day after I seized the diamonds.

As the Court fully understood the grounds of the objection, it was unnecessary to repeat it upon the face of the record. As a matter of fact, the grounds of the objection were stated, but the Court reversed its ruling as to the preceding question. The learned trial judge, as appears from the face of the record, was not misled, and knew, from his own decision, just made, the ground of the objection; but, on the ingenious argument of the learned District Attorney, reversed his former ruling and held the evidence was competent to corroborate.

As the only purpose of any rule requiring the ground of the objection to be stated is for the information of the Court, the reason of the rule ceases when the record affirmatively shows that the Court is cognizant of the grounds of the objection, and the rule would therefore cease to have application in such a case.

In *Lucas vs. United States*, 163 U. S., 612 (1896), *Mr. Justice Shiras* thus disposed of a contention as to the form of objection to hearsay evidence (p. 617):

"It is contended in this court, on behalf of the Government, that exception to this evidence was not sufficiently taken. The record, however, discloses that the counsel for the defendant, at the trial, objected to the questions put to the witness Le Flore to elicit the statements made by Kemp. It is true that the question had been put and answered before the objection was made, but the defendant's counsel asked that the testimony should be excluded and that an objection should be noted, and thereupon the judge declared the evidence competent. It is, therefore, apparent that the objection was made in time to enable the Government to introduce other and more competent evidence, and that the judge did not overrule the objection becanse it was not taken in time, but because he deemed the evidence competent."

Every objection made at a trial will be included within one of the following:

1. That a witness called is incompetent. In such case the objection must be upon the express ground of the incompetency of the witness, who is the instrument by which the probative facts are conveyed to the court. The reason of the rule is, that the evidence elicited has a logical and juridicial tendency to prove a fact in issue, and is admissible for that purpose, but that the document, by reason of positive rules of law, is incompetent to be the channel of evidence.

2. That a document is incompetent. In such cases the objection must be upon the express ground of the incompetency of the document, which is the instrument by which the protective facts are conveyed to the Court. The reason of the rule is that the matters contained in the document have a logical and juridicial tendency to prove a fact in issue, and are admissible for that purpose, but that the document, by reason of positive rules of law, is incompetent to be the channel of the evidence. Of this character are the cases cited by the Assistant Attorney-General of *Toplitz vs. Hedden*, 146 U. S. 252, 255 (1892), where a paper was read without proof that it was a copy; of *Burton vs. Driggs*, 20 Wall. 125, 135 (1874), of reading from the copy of a deposition; of *Wood vs Weimer*, 104 U. S., 786, 789, 795, of reading from a document not duly attested.

3. That the form of the question is leading. As the Courts hold that putting of leading questions is within the discretion of the Court, the discussion of the form of the objection on this point would be immaterial.

4. That evidence is inadmissible. In such cases, where a Court is not informed of the ground of the objection, it should be stated, as seems to have been held in *United States vs. Shapleigh*, 11 U. S., App. 26, 46, 47 (1893); *Charlestown Co. vs. Joyce*, 8 U. S. App., 309, 311–312 (1893); *Walsh vs. Calslough*, 9 U. S., App. 537, 545 (1893); *Ward vs. Mfg. Co.*, 12 U. S. App., 295, 302–305 (1893).

The reason of the rule is, that the trial judge may not be misled. The reason of the rule ceased in the case at bar, because, as we have shown, the judge out of his own mouth stated the grounds of the objection. And if this Court will go so far as to notice an error, though not even assigned, *Wiborg vs. United States*, 163 U. S. 632, 633 (1896), it is clear that this Court will not overlook an objection duly made, a ruling duly excepted to and duly assigned for error, by an overstrained application of an abstract technical rule, where the reason, object, and purpose of the rule does not apply to the concrete case presented. This is an application of a rule of pure logic, *cessante ratione legis cessat ipsa lex*. Coke on Littleton, 70*b*; Broom's Legal Maxims, 159–163.

V.

Evidence Erroneously Excluded.

(1) In every case the following are pertinent hypotheses: (a) the issue made by the pleadings; (b) the truthfulness of a witness; (c) the accuracy of a witness; (d) the bias of a witness; (e) the probability or improbability of the evidence of the witness. It is competent to introduce evidence to prove or disprove any or all of said hypotheses, and such evidence is relevant and admissible, and its weight for the jury.

(1a) A sea captain testified that while in Europe a stranger procured him to agree to smuggle diamonds into America; that he saw the stranger but fifteen or

thirty minutes; that the conversation was carried on in Flemish by a friend of the captain; that the stranger wrote an address on a piece of paper, and that he said, "by Adams Express" in English; that he did not know the stranger by name, and could only identify him by his face; and that he expected to better his condition by testifying that he (the Captain) wrote the address on the package in Europe, although the package seized had no address on it. Said stranger, when on trial charged with said smuggling, denied meeting the Captain, the alleged transaction, and having any conversation with him. Under said circumstances it is competent for said defendant to offer evidence to show that he dealt wholly in rough diamonds; could not make use of the diamonds in his business; he never handled diamonds of the character alleged to have been smuggled, and had no motive to smuggle. Such evidence is competent in support of the hypothesis that the Captain was mistaken in his identity, biased in his evidence, and that the evidence of the Captain was improbable and that of the defendant probable. It being thus relevant to a pertinent hypothesis, the Court must admit it; its weight is for the jury.

(1 b) On the trial of the said defendant, the said Captain, a resident of Antwerp, testified that when, on January 27, 1896, the diamonds were handed to him by his friend, the stranger (Mr. Keck) wrote on a piece of paper the name T. Van Reeth, 21 West Fourth Street, Cincinnati, and handed it to him; that he (the Captain) wrote the address on the package in Europe, although the package seized had no address on it; that he kept said paper in his pocket, and produced it for the first time March 18, 1896; the Captain steamed his vessel into the port of Philadelphia February 11, 1896; was arrested and the diamonds seized. On his arrest, and thereafter, he claimed to have given a full statement of the receipt of the diamonds and the circumstances surrounding same. After his arrest he made a trip to Europe and returned to testify against Mr. Herman Keck, March 18, 1896, when, for the first time, the Captain produced the paper and claimed that it had existed since January 27, 1896. He denied that he knew Franz Van Reeth, but admitted that he might have seen the name and picture of Franz Van Reeth in the Antwerp newspapers, with the statement that Franz Van Reeth had gone to Cincinnati to cut diamonds. Franz Van Reeth, a diamond cutter and former resident of Antwerp, testified that he had known the Captain for twelve years. Mr. Constant Van Reeth, of Antwerp, a son of Franz Van Reeth, was called as a witness. It was offered to prove by him that the newspaper which the Captain stated he read, did contain the name and picture of his father, Franz Van Reeth, together with a statement that his father had gone to Cincinnati to cut diamonds. Such testimony was relevant to the pertinent hypothesis that the witness, Captain Frank Loesewitz, was untruthful, biased in not admitting the whole truth; that the paper was spurious, prepared between the time of his arrest and the time of testifying against Mr. Keck; that the Captain had an opportunity to prepare the same on his revisit to Antwerp between said etims, and it ought to have been admitted, and it was error for the Court to exclude it.

We have set forth in our statement of the case (brief, pp. 10–12) two instances of the wrongful exclusion of evidence. They will be presented separately.

First.—The Court sustained an objection to a question

(original record, p. 175; printed, p. 93) put to the witness, Mr. Franz Van Reeth, and the error arose as follows:

There was a direct conflict between the testimony of Captain Frank Loesewitz and Mr. Herman Keck, the plaintiff in error, and when Mr. Franz Van Reeth was upon the witness stand he was asked certain questions, which were ruled out by the Court. Mr. Franz Van Reeth was manager of the Coetermans-Henrichs-Keck Diamond Cutting Company, of which Mr. Herman Keck was President. The following testimony was offered on behalf of Mr. Herman Keck, plaintiff in error, as relevant, as making probable the testimony of Mr. Herman Keck, and improbable the testimony of Captain Frank Loesewitz (original record, p. 175; printed, p. 93), to wit:

Q. "What kind of stones are imported by your firm, cut diamonds or rough?"
A. "Rough."
Q. "What do you do with the rough?"
(Objected to.)
Mr. Shields: "My purpose is to show that they deal wholly in rough diamonds, that they can not make any use of the cut diamonds in their business, and to follow that up by the people who handle their goods and the people who have seen them; that they never have any of this kind of material in their place at all, so as to show there was no motive on the part of these gentlemen to smuggle this stuff in."
(Objected to. Objection sustained. Exception allowed for defendant.)

This ruling of the Court is assigned for error as number nine in the assignment of errors (original record, pp. 215–216; printed, pp. 115–116), and is set forth in the petition for writ of error (original record, pp. 225–226; printed p. 119). It has already been set forth in our statement of the case (brief, p. 10–11).

This testimony was clearly competent as rendering probable the testimony of Mr. Herman Keck, and improbable the transaction claimed by Captain Frank Loesewitz to have taken place.

The rules of relevancy and their application are shown by the text writers, and in many adjudged cases.

In Thayer's Cases on Evidence, 2, the rule is thus laid down:

"Observe at this point one or two fundamental conceptions. There is one precept to be mentioned, which is not so much a rule of evidence as a pre-supposition involved in the very conception of a rational system of evidence as contrasted with the old formal and mechanical system: viz., nothing, which is not supposed to be relevant, *i. e.*, logically probative, shall be received. How are we to know what these things are? Not by any rule of the law. The law furnishes no test of relevancy. For this, it tacitly refers to logic, assuming that the principles of reasoning are known to its judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known.

"And there is another precept which it is convenient to lay down as a preliminary one in stating the law of evidence, viz., that unless excluded by some rule or principle of law, all that is logically probative is admissible. This general admissibility of what is largely probative is not, like the former precept, a necessary presupposition in a rational system of evidence; and, accordingly, there are very many exceptions to it. But yet, in order to a clear conception of the law, it is important to notice this also as being a fundamental proposition."

And again (p. 3):

"The law of evidence is the creature of experience, rather than logic, and we can not escape the necessity of tracing that experience. Founded, as being a rational system, upon the laws that govern human thought, and so presupposing and conforming to these, it yet recognizes another influence that must, at every moment, be taken into account; for it is this which has brought it into being, as it is the absence of this which alone accounts for the non-existence of these rules in all other countries, ancient or modern. For, as I have already indicated, the main errand of the law of evidence is to determine, not so much what is admissible in proof, as what is inadmissible. Assuming, as it does, that, in general, what is evidence is receivable, it is occupied in pointing out what part of this mass of matter is excluded. It denies to this excluded part, not the name of evidence, but the name of admissible evidence. Admissibility is determined, first, by relevancy—an affair of logic and not of law; second, but only indirectly, by the law of evidence which, in strictness, only declares whether matter, which is logically probative, is excluded."

The same principle was announced in a controversy involving identity by *Marshall, J.*, in *Bell vs. Brewster*, 44 Ohio St. 690 (1887), in somewhat different language, when he said (at p. 699) that:

"Judicial proof is not a matter of mere arbitrary rule. Its principles are drawn from the experience and observation of men, and should be applied as they are by men in general. Every lawyer and judge of experience will confirm what is said by Mr. Phillips in his work on evidence: 'It may be laid down as a first principle that exclusion is generally an evil and admission generally safe and wise.' To which he adds: 'It is certain the administration of justice in our courts has suffered, not from too free admission of evidence, but from too rigid exclusion.' 2 Phil. Ev. (Edwards Ed.), 628."

In 1 Wharton on Evidence (3d Ed.), Sec. 20, the rule is thus admirably stated:

"Relevancy is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis, being one which, if sustained, would logically influence the issue. A will, for instance, is contested, and several hypotheses are presented, on any one of which, if proved, the instrument would be invalid. The signature, for instance, may have been forged, or the testator insane, or he may have been fraudulently induced to execute a paper different from that which he had in view. To each of these hypotheses, a series of counter hypotheses is conceivable. If the hypothesis set up for the defense is forgery, then all facts which are conditions of forgery are relevant. A party, for instance, sued on a bill sets up forgery; to meet this hypothesis, it is admissible for plaintiff to prove that the defendant, at the time of the making of the bill, was trying to borrow money. If the hypothesis set up for the defense is fraud, then all facts which are conditions of fraud are relevant. Or, to take another illustration: A prairie is fired, it is said, by a passing locomotive; the hypothesis of the plaintiff is that the firing was by negligence, and for the plaintiff all the conditions of negligence are relevant. The defense sets up *casus*, or contributory negligence; and then, on the part of the defense, it is relevant to prove the conditions of either of the latter hypotheses."

And again (at Section 21):

"Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less *improbable*."

The learned writer illustrates his main proposition (in Sec-

tion 23) as to pertinent hypothesis as to proof of the author of Junius; and (in Section 24) as to identify in the famous Tichborne case.

Sir James Fitzjames Stephen, in his Digest of the Law of Evidence, Part 1, Chapter 2, Article 7, lays down the following rule:

"When there is a question whether any act was done by any person, the following facts are deemed to be relevant, that is to say:

"Any fact which supplies *a motive* for such an act, or which constitutes preparation for it."

He illustrates this rule as follows:

"The question is, whether A. murdered B. The facts that, at the instigation of A., B. murdered C twenty-five years before B.'s murder, and that A. at or before that time used expressions showing malice against C. are deemed to be relevant as showing *a motive* on A.'s part to murder B."

The author quotes *R. vs. Clewes*, 4 C. & P. 221. The American editor (Mr. William Reynolds) cites *McKee vs. People*, 36 N. Y., 113; *Kolb vs. Whiteley*, 3 G. & J. 188, 195; *Garber vs. State*, 4 Caldw. (Tenn.), 161, 165.

In Wharton on Criminal Evidence (9th Ed.), Section 17, the rule is thus stated:

"Suppose the question to be, *whether it is more probable* that a given abstract man (the witness) should have committed one crime, that of perjury, than that another given abstract man (the defendant) should have committed another crime, that of murder; here, if we divest the issue of all circumstances on either side, *there is simply a balance of improbabilities* in weighing, which the mind must incline, if it incline at all, to the acquittal of the darker crime."

And again (Section 18):

"Perjury, indeed, is never to be presumed; but we can not shut our eyes to the fact that convictions have sometimes been based on perjured testimony; and, though the probability of perjury may be but one to a hundred, yet this is only another way of saying that it is probable to a very high degree, but not certain that there is no perjury in the testimony brought before us in any given case. It is true that *there may be forgery of facts as well as falsification by witnesses:* and it is true, also, that with the exception of such objects as

can be brought into court on trial, the adjudicating tribunal must become cognizant of indicatory facts through witnesses who may be as much tempted to perjure themselves in giving this kind of testimony as in giving other kinds of testimony. But it can not be denied that perjury, in respect to that of which a witness says he was the only observer, is more easy than perjury in respect to extrinsic facts open to common observation, and *a forti ori* more easy than the forgery of such facts. Perjury of the first-class is skillful in eluding detection; is self-contained and self-verifying; it can be consummated without observation and without machinery; it is thus easily concocted and not easily exposed. On the other hand, extrinsic facts can not be forged without attracting more or less attention, nor testified to without that possibility of exposure inherent in all fabrications of matters extrinsic. False direct testimony, also, hangs ordinarily on a single link, and if that link is sufficiently strong the case succeeds. But it is of the essence of what is called circumstantial evidence; *i. e.*, evidence dependent on the collection of numerous self-supporting facts—that if one of these facts should turn out to be forged, the taint affects the whole system. *The probability of detection of falsification is, therefore, in proportion to the number of issues presented.*"

And again (Section 21):

"The evidence on trial consisting, therefore, of a series of facts more or less closely connected, argument consists in the application to these facts of particular hypotheses; and in criminal issues, if there be no probable hypothesis of guilt, consistent, beyond reasonable doubt, with the facts of the case, the defendant must be acquitted. But this is not the only use of hypothesis. *It is only by appealing to hypothesis that questions of relevancy * * * can be determined. * * * Hypothesis, thus, is the basis on which admissibility of evidence must rest, as it is the basis on which must rest either acquittal or conviction.*"

And again (Section 23):

"*Relevancy is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being that which logically affects the issue.* A person is found dead, for instance, with marks of violence on his body, and at once a series of hypotheses are tried in turn, as keys to a lock, to see if they will disclose the secret of the death. Were the wounds homicidal or suicidal? * * * If a person is on trial for the homicide, then against him are admissible all facts that sustain any hypothesis which implies his guilt. When it is his turn to develop his defense, then any facts are admissible that would sustain the hypothesis of his innocence."

And again (Section 24):

"Relevancy is therefore to be determined by free logic, unless otherwise settled by statute or controlling precedent. All facts that go either to sustain or impeach a hypothesis logically pertinent are admissible. But no fact is relevant which does not make more or less *probable* such a hypothesis."

These rules have been applied in numerous cases.

In *Wiggins vs. People, etc., in Utah*, 93 U. S., 465 (1876), the facts were as follows: Mr. Wiggins was indicted for killing John Kramer (p. 466); Dobson, called by the State, was the only percipient witness (excepting the defendant Wiggins) to the killing (p. 467); Dobson was unable to tell who fired the first shot; Wiggins was convicted. On his trial he offered to prove by witness Heslop (p. 466) that prior to and on the night of the killing, the deceased, John Kramer, made a threat that he would kill the defendant, Wiggins, before he went to bed. Defendant Wiggins could not and did not attempt to show that the threat had been communicated to him. On the objection of the District Attorney, the Court excluded this evidence, and an exception was taken. Mr. Wiggins prosecuted error and the Supreme Court of the United States held that the evidence was competent, ought to have been admitted, that the trial court erred in excluding it, and set aside the conviction and reversed the judgment.

Mr. Justice Miller, who delivered the opinion of the Court, said (p. 470) that:

"Now, when, under all these circumstances, the witness, and the only witness who was present at the encounter, swears that he can not tell where the first shot came from, though he knows that defendant only fired three, it must be very apparent that if the person to whom the deceased exhibited that pistol a few minutes before the shooting had been permitted to tell the jury that deceased then said, 'he would kill defendant before he went to bed that night,' it would have tended strongly to show where the first shot came from, and how that pistol with one chamber emptied came to be found on the ground. *This testimony might*, in a state of mind produced on the jury by the other evidence we have considered, *have turned the scale in favor of defendant*. At all events, we are of opinion that in that condition of things it

was relevant to the issue and should have been admitted. Judgment reversed, with directions to set aside the verdict and grant a new trial."

In *Nickerson vs. Spindell*, 164 Mass. 232 (1895), the plaintiff sued for service and money paid. The defendant contended that the services were rendered and money paid gratuitously without intention of compensation and repayment. The Court held that it was competent to show that plaintiff was then engaged in other business, at which he was earning from three to ten dollars a day as rendering *probable* plaintiff's case, and rendering *improbable* defendant's claim.

In *Buswell Trimmer Co. vs. Case*, 144 Mass., 350 (1887), the evidence was directly contrary. On the one side it was testified that the sale was conditional whereby the machine sold was to remain the vender's property. On the other side it was testified that the sale was absolute with a four months' credit. The Court held that it was competent to show the purchaser's financial inability, as rendering *probable* the vender's claim, and *improbable* the purchaser's claim.

In *Parker vs. Coburn*, 10 Allen, 82 (1865), *Mr. Justice Gray* said (at p. 84–85), that:

"The defendant in his answer put in issue the making of the contract alleged by the plaintiff, and averred that the testator never agreed to pay more than $1,500 for the land; that sum was the consideration named in the deed to him from the plaintiff. The testimony of one of plaintiff's witnesses tended to show that the half of the farm was not worth $2,000, without the wood, and that there was $1,000 worth of wood standing on the whole farm, or $500 to each undivided half. The deeds offered in evidence by the defendant showed that the plaintiff had some years before conveyed to his father the right to cut the wood, and were material evidence upon the question, *what price he agreed* to pay for the land. *Bradbury vs. Dwight*, 3 Met., 31. Those deeds having been excluded by the presiding judge, the defendant is entitled to a new trial."

In *Norris vs. Spofford*, 127 Mass., 85 (1879), the materiality of the evidence offered fully appears from the opinion of *Soule, J.*, as follows:

"The parties agree that a contract was made between them, by which the plaintiff was to sell his horse and diamonds to the defendant. The controversy is as to the consideration for that sale. The plaintiff introduced evidence tending to prove that he was to receive in payment a horse called Little Ned, and that the defendant fraudulently delivered to him a horse of much less value. The defendant, admitting that he delivered the less valuable horse, contends that the bargain was for that horse, and not for Little Ned, and introduced evidence tending to prove this. The evidence being conflicting as to what the contract was, it was competent for the defendant to show that the value of the property which he was to receive, and did not receive, in accordance with the bargain made, was, and was known to the parties to be, far less than the value of Little Ned. This fact, if proved, would have a tendency to show that *probably* the contract was not for the sale of the more valuable horse to the plaintiff, but for the sale of the horse which he actually received; and so, that the plaintiff has no cause of action. *Bradbury vs. Dwight*, 3 Met., 31; *Lee vs. Wheeler*, 11 Gray, 236; *Rennell vs. Kimball*, 5 Allen, 356; *Parker vs. Coburn*, 10 Allen, 82; *Upton vs. Winchester*, 106 Mass., 330; *Brewer vs. Housatonic Railroad*, 107 Mass., 277. The learned judge who tried the case in the Superior Court erred, therefore, in rejecting the evidence offered by the defendant on this point."

Upton vs. Winchester, 106 Mass., 330 (1871) was an action on a contract. The question arose on the exclusion of evidence. *Martin, J.* (pp. 330–331), thus disposes of the question:

"The plaintiff's evidence tended to prove that the defendants purchased of them a quantity of planks lying in two ranges in the plaintiff's mill-yard, consisting almost entirely of oak, but containing a little ash; and that the defendants, knowing that a part of it was not oak, agreed to pay $23 per thousand feet for the planks in the two ranges, according to a survey which had been made. The defendants denied this, and their evidence tended to prove that they entered into negotiations with the plaintiff for the purchase of the oak planks contained in the two ranges, but that no contract of purchase was ever completed, and that they never bought any of the planks, and never talked of buying any of it, except the oak.

"In this state of the evidence, the defendants offered to prove that the said two ranges of planks embraced maple and beech, besides oak and ash, and the number of feet of each kind, and they also offered evidence to show the market value of oak plank at the date and place of the alleged contract;

but the court rejected the evidence. We are of opinion that this evidence should have been admitted.

"If this contract was conceded to be as claimed by the plantiff, this evidence would be inadmissible: but the issue between the parties was whether the defendants had made such a contract. Upon this issue it was competent for either party to show what was the contents of the two ranges. If they contained a large proportion of plank of small value, like maple or locust, the inference fairly to be drawn might be that the defendants had not made the contract as alleged. It would show an *improbability* in the plaintiff's claim. For the same reason, the evidence to show the market value of oak plank was competent. If it was $23 per thousand feet, or less, it would tend to show a *probability* that the contract was not as claimed by the plaintiff. Either fact offered to be proved by the defendants might reasonably have an influence on the minds of the jurors, and aid them in deciding the issue. *Bradbury vs. Dwight*, 3 Met., 31; *Lee vs. Wheeler*, 11 Gray, 236."

In *Allison vs. Horning*, 22 Ohio St., 138 (1871), the Court admitted evidence of the value of work at the time a contract was made therefor, as tending to show what the *agreed* price was, where the testimony was conflicting as to the agreed price. Judge Day, who delivered the opinion of the Court, said (at p. 142) that:

"The only point of difference between the parties was the *price* for which it was *agreed* the work should be done. The evidence was admitted for no other purpose than to enable the jury to decide which of the prices claimed by the respective parties was the true price agreed upon. * * * * It was of some value as tending to show the *improbability* of the claim of the defendant."

In *Tompkins vs. Starr*, 41 Ohio St., 305 (1884), the syllabus is as follows:

"Where T. claimed and had offered evidence to show that S., her brother, had agreed to furnish her a home as long as she lived, if she would act as his housekeeper, and S. claimed that by the arrangement between them T. was to be his housekeeper only so long as they could agree, or as long as they should get along together. *Held:* That it was competent for S. as tending to support his claim to prove that T. was a person of peevish, nervous, and disagreeable temper, and that none of her relatives who had tried to live with her could do so; and that these facts were known to S. when the arrangement to live together was made."

Judge McCauley, who delivered the opinion of the Court, said (p. 306) that:

"If the plaintiff was of such peevish and disagreeable temper that none of her relatives could live with her, and this was known to the defendant when the arrangement to keep house was made, these facts would strengthen the *probability* that the arrangement was temporary, as claimed by the defendant, rather than for life, as claimed by the plaintiff."

In *Dyer vs. Isham*, 4 Ohio Circuit Court Reports, 429 (1890), a debt had been discharged by bankruptcy proceedings. The plaintiff testified that after the bar defendant had acknowledged and promised to pay the debt, the defendant on the witness stand denied making such promise. The plaintiff thereupon attempted to prove that at the time of making the alleged promise the defendant was worth $25,000 over and above his liabilities *as rendering probable* the testimony of the plaintiff that the defendant had promise to pay the debt after the bar. The trial court excluded the evidence, and this was assigned for error. The Circuit Court reversed the judgment, holding the testimony competent for the purposes for which it was offered. The opinion was delivered by Judge James M. Smith, who is regarded by the bench and bar of Ohio as one of the ablest members of her judiciary. He said (pp. 433-434) that:

"We are of the opinion that evidence of the financial condition of Mr. Isham at the time in question was relevant—that the legitimate tendency of it, in connection with the other facts proved in the case, would have been to show *that the proposition as to the promise which was in issue was more or less probable.* It would seem to us that a man in independent circumstances, or of large means, whose friend had paid debts for him, from which he was legally discharged, but which he had declared should be paid in full, would be much more likely to bind himself by a promise to pay them, than if he were in reduced circumstances, and had barely sufficient to maintain himself or family. Of course, such evidence of itself would be of little weight, for we recognize the fact that a man of great wealth, while admitting the justice of such claims upon him, might have declined under the circumstances named to bind himself to the payment of these barred debts.

But we think the experience of men has shown that it is more probable that a man of ample means should do this, than one who was not financially able to do so.

"But whether this be so or not, if such evidence would have had the tendency to make the fact as to the promise having been made more or less improbable, still it should have gone to the jury. The safer and more satisfactory rule is for the judge to admit whatever is relevant, and leave the question of its weight for the jury."

In *Holman vs. Raynesford*, 44 Pacific Reporter (Kansas), 910, (1896), the Court held it relevant to show the circumstances surrounding the transaction in controversy, the relations of the parties to each other and to the transaction, for the purpose of aiding the jury in judging of the reasonableness of the respective claims of the parties, who testified directly contradictory to each other.

In the case on trial, the admitted evidence discloses that Captain Frank Loesewitz and Mr. Herman Keck were strangers; that he did not know Mr. Keck's name, but remembered his face; that Mr. Herman Keck was President of The Coetermans-Henricks-Keck Diamond Cutting Company, of Cincinnati, which company was engaged in cutting diamonds; that Mr. Herman Keck was a gentleman of large means, whose high character, reputation, and integrity was sustained by six of the leading business men of the City of Cincinnati, including its Mayor (original record, pp. 154–160; printed, pp. 80–83). The witness, Captain Frank Loesewitz, testified that he had never seen Mr. Keck but once in his life, then for about fifteen to thirty minutes, in going from the residence of Mr. Van Hammelrick to the Café Alsacienne, drinking a glass of beer, Mr. Van Hammelrick handing Captain Loesewitz a package of diamonds, and walking a half square on the Place Verte; that the only words positively testified as having been spoken by Mr. Herman Keck, were "by Adams Express;" that he (Loesewitz) wrote the address "T. Van Reeth" on it himself; that the package seized had no address on it. Mr. Herman Keck, plaintiff in error, posi-

tively and categorically denied the alleged meeting and transaction. Under the rules laid down, and the circumstances stated, it can not be disputed that the evidence offered in behalf of Mr. Herman Keck, that he and his company dealt wholly in rough diamonds, could not use cut diamonds, never carried diamonds of the character alleged to have been smuggled, had no motive to smuggle, were relevant as rendering probable the testimony of Mr. Herman Keck and improbable that of Captain Frank Loesewitz as to the transaction alleged to have taken place in the Café Alsacienne and upon the Place Verte and the claimed identification of Mr. Keck.

We do not contend that a man without motive may not smuggle, but we do contend that the evidence offered had a tendency to show the *probability* of the testimony of Mr. Herman Keck and the *improbability* of this testimony of Captain Frank Loesewitz, especially as they directly contradicted each other as to the alleged main transaction. A court has no discretion to exclude legal evidence merely because the trial judge does not attach much weight to it, as its weight is for the jury. *Bradbury vs. Dwight*, 3 Met., 31, 34 (1841.) Taken in its entirety, the testimony offered in the trial was the most important evidence that Mr. Keck had to offer If the court had admitted the evidence, as it should have done, it would have turned the scales, and have been, at least, sufficient to raise a reasonable doubt, to the benefit of which the defendant was entitled. *Mr. Justice Miller* (at p. 470), in *Wiggins vs. People, etc., in Utah*, 93 U. S., 465 (1876).

The argument against the admission of this evidence goes to the weight, and not its admissibility. In *Bradbury vs. Dwight*, 3 Met., 31 (1841), parol evidence was introduced to prove the contents of a lost instrument. The testimony of plaintiff and defendant was contradictory as to its contents. The defendant offered to prove the value of the article mentioned in the contract to show the probability of his story. The trial judge rejected it, and in reversing the judgment, Putnam, J., answered a similar argument as follows:

"Suppose the evidence would have proved that the wood was worth two dollars a cord; a sale for the price at which the plaintiff alleges that it was rated, would be contrary to the uniform course and conduct of men. The rejected evidence would, indeed, only raise a presumption, which might be rebutted by some particular circumstances that might have operated upon the defendant to sell for less than the known value. But this would not affect the *admissibility* of the evidence. The fact should be submitted to the jury, to be properly weighed by them. And if it were established, and not explained or rebutted, it would certainly have a tendency to disprove the allegation of the plaintiff, that the contract was for a price per cord greatly less than the common value."

It is next contended by the learned Assistant Attorney-General that the admission of this evidence was wholly within the discretion of the Court, because it was circumstantial evidence. According to this argument, no evidence is admissible under positive rules of law, except that of a percipient witness to the facts which make up the issue. Such a rule would exclude evidence admissible under positive rules of law, such as reputation in a criminal case, etc. By the simplest induction from the cases and other authorities cited, the rule is plain that where two witnesses directly contradict each other, any evidence is admissible which tends to render probable or improbable the facts detailed by them, and for error in the exclusion of such evidence the reviewing Court reversed the judgments in *Wiggins vs. People, etc., in Utah*, 93 U. S., 465, 470 (1876); *Parker vs. Coburn*, 10 Allen, 82 (1865); *Norris vs. Spofford*, 127 Mass., 85 (1879); *Upton vs. Winchester*, 106 Mass., 330 (1871); *Bradbury vs. Dwight*, 3 Met., 31, 34 (1841); *Tompkins vs. Starr*, 41 Ohio St., 305 (1884); and *Dyer vs. Isham*, 4 Ohio Circuit Court Reports, 429, 433-434 (1890).

The learned Assistant Attorney-General relies on *Goldsby vs. United States*, 160 U. S., 70, 73; *Thiede vs. Utah*, 159 U. S., 510, 518; *Moore vs. United States*, 150 U. S., 57; and *Alexander vs. United States*, 138 U. S., 353. The *Goldsby Case* simply held that the order of proof was in the discretion of the trial judge; the *Thiede Case* that the order in which testimony

shall be admitted is within the discretion of the trial court; the *Moore Case* the court held evidence as to motive competent; and in the *Alexander Case* the court declined to rule whether it was error to exclude a declaration as part of the *res gestae*, and none of them support the contention of the learned Assistant Attorney-General. On the contrary, in the *Moore Case* referred to, *Mr. Justice Brown* (at p. 60–61) quoted with approval the remarks of *Mr. Justice Clifford* in *Castle vs. Bullard*, 23 Howard, 172, 187, that:

"Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the injury or the failure of direct proof, *objections to testimony on the grounds of irrelevancy are not favored*, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other."

Second.—The court sustained an objection to a question (original record, p. 161; printed, p. 84) put to the witness, Mr. Constant Van Reeth, and the error arose as follows:

The witness, Captain Loesewitz, called on behalf of the United States, testified that when Mr. Van Hammelrick gave him the package of diamonds, the stranger, whom he identified as Mr. Keck, gave him the slip of paper with the name of T. Van Reeth upon it (original record, p. 62; printed, pp. 24–25); that he did not know Mr. Van Reeth, and that he may have heard the name Van Reeth; may have read the newspapers and seen the name Van Reeth therein. When shown a newspaper with Mr. Van Reeth's picture therein, witness testified that he may have seen it, but did not recollect (original record, p. 85; printed, p. 39). The piece of paper upon which Captain Loesewitz testified the stranger had written the name, Van Reeth, was not produced or spoken of by Captain Loesewitz at his arrest, February 11, at his hearing, February 12, or at any time at any conversation, and was produced for the first time, March 18, at the hearing of Mr. Keck before Commissioner Bell. This is testified to

by Mr. Gallen, a witness called by the United States (original record, p. 107; printed, p. 52; eleventh line from the bottom).

Mr. Herman Keck, plaintiff in error, produced, among other witnesses, Constant Van Reeth. Among other things he was asked in reference to his father, as follows (original record, p. 161; printed, p. 84), to wit:

Q. "Was his name mentioned in the papers at the time he left?"

A. (Objected to.)

Mr. Shields: I offer to prove that at least one year, and during a period of one year, prior to the 27th day of January, 1896, the name of F. Van Reeth frequently appeared in the public prints of Antwerp, referred to by Captain Loesewitz in his testimony, and that it was well known through the public prints, and by the knowledge that the people of Antwerp had, that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business.

(Objected to; objection sustained; exception allowed for defendant.)

This ruling of the Court is assigned as number eight in the assignment of errors (original record, pp. 214–215; printed, page 115).

The testimony was material, because Captain Frank Loesewitz, a witness for the United States, testified that he did not know Franz Van Reeth (original record, p. 84; printed, p. 38); and Mr. Franz Van Reeth, a witness for Mr. Herman Keck, testified that he had known Captain Loesewitz for twelve years (original record, p. 174; printed, p. 92).

This assignment of error presents another question under the rules of relevancy. The prosecuting witness, Captain Frank Loesewitz, had been indicted three months before the finding of the indictment against Mr. Herman Keck, and for the same offenses charged against Mr. Herman Keck, and expected to better his condition by testifying against Mr. Keck (original record, p. 90; printed, p. 42). He has never to this day been put on trial. Although arrested February 11, 1896, and claiming to have given up the diamonds, and to have fully disclosed his relations thereto

within a few days after his arrest, he did not disclose to anybody the claimed existence of or produce the paper containing the name Van Reeth until the hearing of Mr. Keck before the United States Commissioner, March 18th, 1896, although claiming to have carried the paper in his pocket since the claimed meeting in the Café Alsacienne, January 27, 1896. The learned Assistant Attorney-General is plainly in error as to dates. That the paper was spurious was evidenced by the long delay in producing it, the discrepancy between the letter T and the name Franz; the absence of evidence as to handwriting; that Mr. Franz Van Reeth testified that he had known Captain Loesewitz twelve years; that Captain Loesewitz admitted that he might have known the name F. Van Reeth and might have seen Mr. Van Reeth's picture in a paper; that he himself (Loesewitz) wrote the address on the package in Europe (original record, p. 66; printed, p. 27), and the evidence of witness Gallen that the package seized had no address on it (original record, p. 95; printed, p. 44). It was therefore competent to prove that in the newspapers read by Captain Loesewitz, Mr. Van Reeth's name and picture frequently appeared, accompanied by the statement that Mr. F. Van Reeth had gone to Cincinnati to engage in the diamond business (original record, p. 161; printed, p. 84). This was especially important in view of the fact that the witness, Captain Loesewitz, did not know Mr. Keck by name (original record, p. 83; printed, p. 37), and that Captain Frank Loesewitz had ample opportunity and time during his trip to Europe between the date of his arrest, February 11, 1896, and the hearing of Mr. Keck before the United States Commissioner, March 18, 1896, to manufacture this evidence, because it was on March 18, 1896, he, for the first time, identified Mr. Keck. It is a fair hypothesis to say that Captain Frank Loesewitz may have manufactured this spurious paper, and the evidence offered tended to render *improbable* the evidence that Mr. Keck had given him the paper in the Café Alsacienne.

VI.

Charge of Court to Jury — Part Excepted to.

(1) Where the counts of an indictment omit substantial allegations, and have been duly demurred to, such omissions can not be supplied by a verdict induced by an instruction of the Court.

(2) A charge of a Court to a jury should cover the whole case, and not single out parts of the testimony of one witness. The whole case, on all of the evidence, should be submitted to the jury, and the jury must find from all of the evidence that the defendant is guilty beyond a reasonable doubt, and that the evidence is inconsistent with any reasonable hypothesis of innocence and consistent with every reasonable hypothesis of guilt.

(2a) The defendant was charged with importing contrary to law and with smuggling diamonds. A sea captain, who claimed that the defendant procured him to smuggle the diamonds, was the only percipient witness to the transaction. He testified (a) that a friend, in the presence of the defendant, gave him the diamonds; (b) that the defendant gave him a slip of paper with the name and address of T. Van Reeth thereon; (c) that he wrote an address on the package; (d) that he had been in the habit of bringing over similar small packages and always reporting to the revenue officer upon the dock. The Court charged the jury, that if they believed the statements of the Captain, under oath, "respecting his receipt of the package of diamonds in Antwerp and bringing them here," to find the defendant guilty. Such charge is erroneous as not covering the whole case, or the testimony of all the witnesses or all of the testimony of one witness, and withdraw from the jury certain hypotheses material to the questions of guilt.

The story told by Captain Frank Loesewitz on the witness stand has been heretofore given in substance (this brief, pp. 61–64). In reference to the same, the Court charged the jury as follows (original record, p. 208; printed, p. 112), to wit:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To that much of the charge Herman Keck, plaintiff in error, the jury being then and there at the bar of the Court, then and there excepted, which exception was then and there

duly allowed by the Court (original record, pp. 209–210; printed, p. 113), and the same appears as assignment number seventeen in the assignment of errors (original record, p. 222; printed, p. 118), and is set forth in the petition for writ of error (original record, pp. 226–227; printed, p. 120).

The portions of the charge of the Court excepted to, were erroneous for five reasons, to wit:

First.— The first count of the indictment was duly demurred to as being insufficient in substance (this brief, pp. 23–26). Being thus fatally defective, and having been duly demurred to, it could not be cured by a verdict induced by a charge of the Court. *Moore vs. United States*, 160 U. S. 268 (1895).

Second.— The second count of the indictment was duly demurred to as being fatally defective, insufficient in substance, and because it stated no crime (this brief, pp. 26–59). Being thus fatally defective, insufficient in substance, and stating no crime, and having been duly demurred to, it could not be cured by a verdict induced by a charge of the Court. *Moore vs. United States*, 160 U. S., 268 (1895).

Third.—The third count of the indictment was attempted to have been drawn under Section 3082 of the Revised Statutes of the United States, in that there was a violation of Section 2802 of the Revised Statutes of the United States. This was duly demurred to, and the demurrer should have been sustained. But as the Court instructed the jury to return a verdict of not guilty thereon (original record, p. 206; printed, p. 111), it has been taken out of the discussion.

Fourth.—The evidence was clearly insufficient to sustain the second count of the indictment (this brief, pp. 59–82). The Court told the jury that if they believed the story of Captain Loesewitz they must find the defendant guilty. If the story of Captain Loesewitz were true, the facts detailed by him do not constitute an offense under the Act of February 27, 1877, 19 Stat. at L., 247, amending Section 2865, Rev.

Stat., under which the second count of the indictment was drawn (this brief, p. 75).

Fifth.—The charge of the Court is erroneous, because it did not cover the whole case. It should have put certain hypotheses to the jury, which, if they found established, from all the evidence, beyond a reasonable doubt, to find the defendant guilty, and not two isolated occurrences forming but a part of the testimony of one witness. 2 Thompson on Trials, Sections 2328 and 2421.

The correct rule in charging juries is thus stated in 2 Thompson on Trials, Section 2328, to wit:

"Instructions should cover the whole case, and should not be so framed as to single out isolated portions of the evidence not in themselves decisive. * * * * But the error of singling out isolated facts, not in themselves decisive of the merits of the controversy, and instructing the jury that if they believe such facts they will find for one party or the other, is not regarded as non-direction, but as mis-direction, and an invasion of the province of the jury. It is a frequent and pernicious error, for which judgments are constantly reversed. * * * * On the trial of an indictment for an assault with intent to murder, the law presumes the defendant innocent of the felony, unless the whole evidence satisfies the jury that he made the assault with the particular intent alleged in the indictment. In such a case it is error for the Court, in charging the jury, to select from the mass of the evidence a portion only of the facts disclosed by it, and to declare that if such facts are proved, the law presumes that the act was malicious, and that the defendant intended to kill. Such a charge takes away from the defendant the presumption of innocence upon the selected facts only; whereas, according to law, that presumption can not be taken away except by a conviction of his guilt produced on the minds of the jury by the whole evidence."

This rule has been applied in, among other cases, *Stevenson vs. United States*, 162 U. S., 313 (1896); *Brown vs. United States*, 159 U. S., 100 (1895); *Mills vs. United States*, 164 U. S., 644 (1897); *Clement vs. Packer*, 125 U. S., 309 (1887); *Inland & S. Coasting Co. vs. Tolson*, 139 U. S., 551, 557 (1891); *Adams vs. Roberts*, 2 Howard, 486, 496 (1844); *Jewell vs. Jewell*, 1 Howard, 219, 233 (1843); *Greenleaf vs. Birth*, 9 Peters, 292 (1838).

In *Clement vs. Parker*, 125 U. S., 309 (1887), while the trial court did not positively and imperatively direct the jury to find for the plaintiff, it was, in its logical effect, a syllogysm; its major premises was a general rule as to the effect of the absence of certain evidence and its minor premises that there was not said certain evidence (p. 327). The conclusion was easy, that *upon the evidence singled out*, to find for the plaintiff. Mr. Justice Lamar, who delivered the opinion of the Court reversing the judgment, said (p. 327) that:

"The direct tendency, if not the avowed purpose, of the statements contained in this charge, is to withdraw from the consideration of the jury a very considerable amount of pertinent and important testimony for the defense."

In *Ott vs. Oyer's Executors*, 106 Pa. St., 6 (1884), the Court, among other things, charged the jury (18) that:

"If, then, you are satisfied from the testimony of Phillips and Ott that when this note was given by William Ott to John Oyer," etc.

There had also been introduced the evidence of a witness named Bogardus.

The Court, in reversing the judgment because of this instruction, said:

"All the evidence tending to establish the facts in issue was for consideration of the jury, and in so far as the Court excluded it, there was error."

In the case on trial the Court practically excluded the testimony of all the witnesses except that of Captain Frank Loesewitz, and even limited his to two particulars. It excluded from the consideration of the jury the evidence of Revenue Officer Gallen, that the package seized had no address upon it (original record, p. 495; printed, p. 44).

In *Brown vs. The United States*, 159 U. S., 100 (1895), Brown was indicted for killing Josiah Poorboy. There was conflict in the evidence as to what occurred when the shooting took place, but it appears with reasonable certainty that Brown shot and killed either Whitehead or Poorboy (p. 102). The defendant requested the Court to instruct the jury, that if the

defendant believed the persons attempting his arrest were not officers, and the killing was done in resisting the arrest, the crime would be manslaughter, but not murder. The Court gave the instruction with the following modification (p. 102), to wit:

"Unless such killing was done *in such a way* as to show brutality, barbarity, and a wicked and malignant purpose. If it was done in that way, then it would still be murder."

Mr. Justice Harlan, in delivering the opinion of the Court, said (p. 103) that:

"The jury might well have inferred, from the instruction, as modified, that they were at liberty to return a verdict of murder because alone of the *way* or *mode* in which the killing was done, even if they believed that, apart from the way in which the life of the deceased was taken, the facts made a case of manslaughter, not of murder. We do not think that a verdict of guilty of manslaughter or murder should have turned alone upon an inquiry as to the way in which the killing was done. The inquiry rather should have been whether, at the moment the defendant shot, there were present such circumstances, taking all of them into consideration, including the mode of killing, as made the taking of the life of the deceased manslaughter and not murder."

In *Stevenson vs. United States*, 162 U. S., 313 (1896), John Stevenson was convicted of killing Joe Gaines. The court refused to submit to the jury a special charge upon manslaughter, and refused to submit that issue to the jury. In reversing the judgment, Mr. Justice Peckham said (314–315):

"The question is whether the court erred in refusing this request. The evidence as to manslaughter need not be uncontradicted or in any way conclusive upon the question. So long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine. If there were any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter, it then became a proper question for the jury to say whether the evidence were true, and whether it showed that the crime was manslaughter instead of murder. It is difficult to think that a case of killing by shooting, where both men were armed, and both in readiness to shoot, and where both did shoot, that the question would not arise for the jury to answer, whether the killing was murder or manslaughter, or a pure act of self-defense. The evidence might

appear to the court to be simply overwhelming to show that the killing was in fact murder and not manslaughter, or an act performed in self-defense; and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and can not be matter of law for the decision of court . . . The ruling of the learned judge was to the effect that, in this case, the killing was either murder, or else it was done in the course of self-defense, and that under no view which could possibly be taken of the evidence would the jury be at liberty to find the defendant guilty of manslaughter. The court passed upon the strength, credibility, and tendency of the evidence, and decided as a matter of law what it seems to us would generally be regarded as a question of fact; viz., whether under all the circumstances which the jury might, from the evidence, find existed in the case, the defendant was guilty of murder, or whether he killed the deceased, not in self-defense, but unlawfully and unjustly, although without malice. The presence or absence of malice would be the material consideration in the case, provided the jury should reject the theory of self-defense; and yet this question of fact is, under the evidence in the case, determined by the trial court as one of law and against the defendant."

And again (pp. 321–322):

"Is it perfectly plain and clear, *as a conclusion of law*, that shooting another under circumstances such as were detailed by some of the witnesses in this case can have no tendency to raise within the mind of the person thus assaulted such a sudden passion of anger or terror as to deprive his subsequent act of that malice which is necessary to make it murder? If it is not to be so asserted as matter of law, then it becomes a question of fact in such case, and that question must be answered by the jury. Whether the witness told the truth in regard to such circumstances is not for the court to say, nor is it for the court to decide upon the weight to be given to them if proper for the consideration of the jury."

And again (p. 323):

"A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet, if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter."

In this portion of the judge's charge excepted to, the court limited the inquiry to the testimony of Captain Loesewitz "*respecting his receipt of the package and bringing it here.*" The court left to the jury no alternative but to find defendant guilty if they believed the Captain's testimony in these two particulars. It did not leave the jury all the evidence in the case, or even all of the evidence of Captain Loesewitz, but singled out two parts of the testimony of the Captain Loesewitz. This was to withdraw from the jury all the testimony of all the witnesses except two parts of the testimony of Captain Loesewitz.

Under this charge of the court to the jury the inquiry becomes pertinent, *Which testimony?* The testimony of Captain Loesewitz was inconsistent with itself in important particulars. One story might be consistent with the theory of turpitude and the other with innocence. By the charge of the court it would then become immaterial which of the stories the jury should believe, either the one involving turpitude or the one consistent with innocence, because in either case the jury was bound to find the defendant guilty. Captain Loesewitz swore positively that he had been in the habit of bringing over similar small packages in the same way that he brought over the package seized by Revenue Officer Gallen; and that, after the vessel had been docked, he would go to a custom officer on the dock and report the fact; but that in this case he had no time to go on the dock, as the Treasury agents came aboard before he had an opportunity to go upon the dock (original record, pp. 81–82; printed, pp. 36–37). He further positively testified that the package claimed to have been given to him by Mr. Van Hammelrick, in Antwerp, had upon it an address which he wrote thereon himself (original record, p. 78; printed, p. 34; heretofore set out in this brief, pp. 62–63). The package seized by the revenue officer had no address upon it, as testified to by Revenue Officer Gallen (original record, p. 95; printed, p. 44). The

following is a quotation from Revenue Officer Gallen's testimony:

Q. "Look at that box and tell me whether that is the box?"

A. "Yes, sir, that is the box which I seized."

Q. "Was the box in that condition, with the exception of the tearing of the paper?"

A. "With the exception of the tearing of the paper. That paper was around the box, and then there was another seal right in the corner."

Q. "It was torn off in the tearing of the paper?"

A. "Yes, sir."

Q. "Was there any address whatever upon the box?"

A. "*No address on the box whatever.*"

This is conceded by the learned Assistant Attorney-General. (*Mr. Whitney's brief*, p. 7.)

It is a reasonable hypothesis that the package seized by Revenue Officer Gallen was one of the packages, Captain Loesewitz testified, he had been in the habit of bringing over. (Original record, pp. 81–82; printed, pp. 36–37.)

The only mark of identification known to Captain Loesewitz was the address written by himself. No such box was seized; and it was at least a question for the jury to say whether the box on which he claimed to have put an address was the box which was seized, and upon which there was no address.

The plaintiff in error, Mr. Herman Keck, was presumed to be innocent until proven to be guilty beyond a reasonable doubt, and he was entitled to the benefit of any reasonable doubt arising from *all* the evidence. If there were any reasonable hypothesis consistent with his innocence or inconsistent with his guilt, he should have been acquitted. The case turned on the claimed ability of the witness, Captain Frank Loesewitz, to identify Mr. Herman Keck, a stranger whose name he did not know, whom he had seen for less than half an hour, during which a conversation was carried on in Flemish between Captain Loesewitz and Mr. Van Hammelrick.

There was no evidence that the diamonds were manufactured or purchased at Antwerp, and no Consular invoice was necessary. (Act June 10, 1890, 26 U. S. Statutes at Large, 131, Section 3). These diamonds were personal effects accompanying Captain Frank Loesewitz, a passenger on his own vessel. (Same Act, Section 4.) The defendant was entitled to the benefit of the usual custom of the Captain in such matters, to show that there was no intention not to submit them to the officer of the revenue for examination. (Antimoiety Act, June 22, 1874, 18 U. S. Statutes at Large, 186, Section 4.) This was a pertinent hypothesis, which the Court took from the consideration of the jury, when it limited their deliberations to the mere truthfulness of Captain Loesewitz's evidence on the two point of "*his receipt of the package of diamonds in Antwerp and bringing them here.*" The dedendant was entitled to the benefit of the doubt, which might be raised, as to the identity of the package, and by the uniform custom of the Captain in submitting such packages to the custom officials for examination. The jury might have believed the two propositions to which the jury were limited. and still had a doubt as to defendant's guilt. *There was nothing said at the Café Alsacienne as to smuggling of the diamonds, or omitting to submit the same to the officers of the revenue for examination, after the arrival of the ship in port.* If things had taken their usual course, and Revenue Officer Gallen had not been over zealous, in the ordinary course of events, this package would have been submitted to the revenue officers for examination in a way different than they were submitted. (This brief, p. 77.) The mere fact that Captain Loesewitz may have incurred penalties for the omission of formalities, does not affect the question of the offense charged in the second count of the indictment, or the fact that bringing over packages on former occasions, and submitting them to the officers of the revenue, had not subjected him to penalties. It was wrong for the Court to take from

the jury all of the evidence of all of the witnesses, including Captain Loesewitz, except two very small portions of Captain Loesewitz's testimony, save as it might bear on Captain Loesewitz's veracity. This action of the Court was doubly prejudicial, as it was a case of identity and of oath against oath.

As we have shown (this brief, pp. 65–66), the crime charged in the second count of the indictment consists of eight elements. The case should have been submitted to the jury with instructions that they should find the defendant guilty if they found the existence of the eight elements, and find the defendant not guilty in the absence of proof, beyond a reasonable doubt, of all the eight elements. *Mills vs. United States*, 164 U. S., 644 (1897). In the case last cited (*Mills vs. United States*, 164 U. S., 644), Mr. Mills, plaintiff in error, was indicted for the crime of rape committed on Florence Hendrix. The Court charged the jury (p. 647):

"The fact is, that all the force that need be exercised, if there is no consent, is the force incident to the commission of the act. If there is non-consent of the woman, the force, I say, incident to the commission of the crime is all the force that is required to make out this element of crime."

An exception was taken to the foregoing part of the charge of the Court. In sustaining this exception and reversing the judgment, *Mr. Justice Peckham* said (p. 646):

"As the verdict of the jury is conclusive upon the merits of the case, it becomes of the highest importance that upon an issue of this kind, maintained by evidence such as this record presents, the Court should charge the jury with accuracy regarding the ingredients of a crime and the facts necessary to be proved in order to show the guilt of the defendant. No portion of the charge of the Court, under such circumstances, can be said to be harmless if it did not state correctly and fully the law applicable to the crime, even although it may be urged that in other portions of the charge the correct rule was laid down."

It is unnecessary to again repeat the evidence and the discrepancies and contradictions therein to show the peculiar applicability of the remarks of *Mr. Justice Peckham* to the case at bar.

VII.

Answer of Court to Request Number Ten for Special Instruction.

(1) It is error for a court, in answer to a request for a special instruction, to affirm the point generally, and at the same time practically withdraw all of the evidence of all of the witnesses from the jury, except two parts of the testimony of one witness.

(1 a) Defendant requested the Court to charge the jury, that a preponderance of the evidence is not sufficient, but that they must find the defendant guilty beyond a reasonable doubt from all of the evidence, and that the evidence must be consistent with hypothesis of guilt, and inconsistent with any hypothesis of innocence. The Court answered affirming the request generally, but gave it the meaning that the jury should find the defendant guilty if they believed the defendant guilty of the smuggling charged, as testified to by the prosecuting witness. The effect of such charge is to withdraw from the jury all of the evidence of all of the witnesses, except that of the prosecuting witness, and confine his testimony to so much thereof as pertain to the smuggling charge, as testified to by him, and is error.

(1 b) It is error for a court to instruct the jury to find a defendant guilty generally under an indictment alleging a violation of three provisions of law, if they find the defendant guilty of one provision, which is not sustained by the law and evidence.

The error here assigned arose in the following manner, the Court, in its general charge to the jury, stated the following (original record, p. 209; printed, p. 113), to wit:

"Now, from a very careful examination of all the testimony heard on both sides, you must determine whether the defendant is guilty or not. If such an examination does not satisfy you beyond reasonable doubt of the defendant's guilt, you must acquit him. If it does so fully satisfy you of his guilt, you should convict him."

Upon this subject, Herman Keck, plaintiff in error, requested the Court to give the following instruction to the jury (original record, p. 207; printed, pp. 111–112), to wit:

"No. 10. The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a

preponderance of evidence of guilt. A preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, *but the jury must be convinced beyond reasonable doubt, from the evidence*, that the defendant, Herman Keck, is guilty as charged. *Before the jury can find the defendant guilty, the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence.*"

The Court answered this request as follows (original record, p. 207; printed, p. 112), to wit:

"The Court affirms the 10th point generally, but the meaning ascribed to it by the Court is, that the jury shall be fully convinced, from a careful examination of all the testimony heard, that the defendant is guilty of the smuggling charged, *as testified to by Captain Loesewitz*, and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilty generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal, and should be acquitted."

Herman Keck, plaintiff in error, duly excepted to the answer of the learned court to the request for said instruction, number ten (original record, p. 208; printed, p. 112), and the ruling of the court was duly assigned as number sixteen in the assignment of errors (original record, pp. 220–221; printed, p. 117).

This action of the Court was erroneous in three respects:

First.—The Court was asked to instruct the jury that they must be convinced beyond a reasonable doubt, from all the evidence, of the defendant's guilt. The Court said that it affirmed the point generally, but confined the investigation to the one question of being convinced, from all the evidence, that the defendant was guilty of smuggling, charged, *as testified to by Captain Loesewitz*. This much of the question has been heretofore discussed under the part of the charge excepted to (brief, pp. 126–133), and is subject to the same criticism as the modification of the charge in *Brown vs. United States*, 159 U. S., 100, 102, 103 (1894).

Second.—The Court was asked in this instruction to say that before the jury could find the defendant guilty the evidence must be consistent with hypothesis of guilt and inconsistent with hypothesis of innocence. The court, in its answer, while affirming the tenth point generally, nullified the question of hypothesis by confining the question of guilt to the *smuggling* charged, *as testified to by Captain Loesewitz.* This practically excluded all presumptions of innocence, all the testimony of all the witnesses, except Captain Loesewitz, save as it might bear upon his veracity; and all testimony of Captain Loesewitz as to his general custom in bringing over such packages, which would have supported the hypothesis that he intended, as in all former cases, to submit this package to the revenue officers for examination. Wharton, Criminal Evidence (9th Edition), Section 21, last sentence; 2 Thompson on Trials, Section 2505.

Third.—We have shown that there was no *smuggling* according to the testimony of Captain Loesewitz (this brief, pp. 65–82), and therefore it was peculiarly error to say that the jury must find Mr. Herman Keck, plaintiff in error, guilty *generally* if they believed him "guilty of the *smuggling* charged *as testified to by Captain Loesewitz.*" (This brief, p. 75).

VIII.

Error for Refusing Application for Dedimus.

(1) It is a maxim that that which is plain is not to be interpreted or construed. When language is plain and unambiguous a refusal to recognize its natural obvious meaning indicates a purpose to change the law by judicial action, and the courts will refuse to depart from such natural obvious meaning. The Revised Statutes must be treated as a legislative declaration of the statute law on the subjects embraced therein on the first day of December, 1873. When that meaning is plain and unambiguous the courts must adhere to it, and can not resort to extraneous aids. It is a condition precedent to a right to resort to a law repealed by a revision that an ambiguity exists in the law as contained in the revision. When the meaning of the revision is plain courts can not look to statutes repealed by the revision to see if Congress erred in the revision.

(1b) Revised Statutes of the United States, Section 866, provides that "any court" of the United States may grant a dedimus potestatum in "any case" where it is necessary in order to prevent a failure or delay of justice. The words "any court" and "any case" are plain and unambiguous, and should be given their plain and ordinary meaning. Giving them their plain and ordinary meaning, the words "any court" include a district court, and the words "any case" include a criminal case. Resort can not be had to Section 30 of the Judiciary Act of September 24, 1789, 1 Stat., 90, for the purpose of raising a doubt and then clearing up the doubt by the original statute.

(1c) A person charged with smuggling presented proof in support of an application for a dedimus that (a) the prosecuting witness was in the habit and practice of smuggling; (b) that the prosecuting witness had carried a written order to Europe on the business card of a New Jersey merchant for the diamonds which were seized; (c) to show the nature of defendant's business in Europe; (d) that from the amount of the prosecuting witnesses income and expenditures, a part of his income was derived from sources other than his wages; (e) record evidence of the prosecuting witnesses prosecution for other smuggling transactions; (f) the general bad reputation of the prosecuting witness for truth and veracity. The Court denied the application because the statute did not apply to criminal cases, and that the circumstances did not call for its application at that time; that it did not appear but what witnesses could have been procured; and that the application came too late, and might have been made months before. The refusal of the Court was erroneous, because it made no finding that it was not necessary to prevent a failure of justice, and the action of the Court was based upon a misapprehension of law and fact.

The indictment was returned against Mr. Herman Keck, plaintiff in error, the 18th day of May, 1896, and eight days later, to wit: the 26th day of May, 1896, Mr. Herman Keck, plaintiff in error, moved to quash the indictment, demurred thereto, and upon the Court overruling same, filed a written application for a *dedimus potestatum* to take depositions at Amsterdam, Holland, and Antwerp, Belgium, in pursuance of Section 866 of the Revised Statutes of the United States, because the testimony to be taken was necessary to his defense, and necessary in order to prevent a failure of justice (original record, p. 18; printed, p. 6; original record, p. 47; printed, p. 16). In support thereof an affidavit was presented, setting forth important matters, which would clearly have been material to him in his defense (original record, pp. 19–28; printed, pp. 6–9; original record, pp. 48–54; printed, pp. 17–20). The Court then and there overruled said ap-

plication, to which ruling of the Court Mr. Herman Keck, plaintiff in error, excepted; which exception was then and there allowed by the Court (original record, p. 54; printed, p. 20), and set forth as number three in the assignment of errors (original record, p. 212; printed, p. 114), and set forth in the petition for a writ of error (original record, pp. 224–225; printed, p. 119). The following day, by leave of Court, the United States presented an answer to the application for the *dedimus potestatum* (original record, pp. 28–32; printed, pp. 10–11; original record, pp. 54–58; printed, pp. 20–21). On the same day, the Court refused the application upon two grounds (original record, pp. 33–34; printed, p. 11; original record, p. 57; printed, p. 22).

The provision of the Revised Statutes under which this application was made is as follows, to wit:

"SECTION 866. *In any case* where it is necessary, in order to prevent a failure or delay of justice, *any of the courts of the United States* may grant a *dedimus potestatem*, to take depositions according to common usage; and any Circuit Court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of Sections 863, 864, and 865 shall not apply to any depositions to be taken under the authority of this section."

The application, which was made eight days after the indictment was found, was as follows (original record, p. 18; printed, p. 6), to wit:

"Now comes the defendant, Herman Keck, and moves the Court for a *dedimus potestatem*, to take depositions at Amsterdam, Holland, and Antwerp, Belgium, in pursuance of Section 866 of the Revised Statutes of the United States, and the testimony to be taken is necessary to his defense, and is necessary in order to prevent a failure of justice."

In support of this, an affidavit was filed setting forth (original record, pp. 19–27; printed, pp. 6–9; original record, pp. 48–54; printed, pp. 17–20), that (1) Captain Frank Loesewitz was in the habit and practice of smuggling and charging

therefor; (2) that Captain Loesewitz had carried a written order to Europe on the business card of a New Jersey merchant for the diamonds which were seized; (3) the exact nature of Mr. Herman Keck's business in Europe; (4) that from the amount of Captain Loesewitz's expenditures, he must be deriving an income other than from his wages as captain; (5) record evidence, as the Captain's connection with other smuggling transactions and prosecutions therefor, of which Mr. Herman Keck learned by cablegram eleven days before making his application for the *dedimus;* (6) that the general reputation of Captain Loesewitz for truth and veracity was bad.

The Government filed an answer, by leave of Court (original record, pp. 28–32; printed, pp. 10–11); original record, pp. 55–57; printed pp. 20–21), in which was set forth: (1) that Section 866 did not apply to criminal cases; (2) that the application came too late; (3) that the evidence went to the credibility of said Captain Loesewitz, as a witness, and that the defendant would have been concluded by his answers thereto; (4) that no notice was given of the application, and the same was not made conformable with common usage; (5) that there were no interrogatories filed; (6) that Herman Keck, plaintiff in error, had the means to procure the attendance of the witnesses; and (7) that the matter rested in the discretion of the Court.

The Court refused the application on two grounds, in the following language (original record, pp. 33–35; printed, pp. 11–12; original record, pp. 57–58; printed, p. 22), to wit:

"The application referred to yesterday is refused on two grounds:

"*First.*—That the statute relied upon is not applicable to the criminal court, nor to trials of causes therein.

Second.—That if it was, the circumstances shown do not call for its application in this case at this time; that it does not appear that the presence of the witnesses could not have been procured by proper effort, and that if it did appear, it

should be held that the application comes too late; that it might have been made months ago, and all delay in consequence of it avoided."

We will consider the answer of the Court in its two parts:

First.—Section 866 of the Revised Statutes of the United States does apply to criminal cases, and it has been so ruled in *United States vs. Wilder*, 14 Federal Reporter, 393 (1882), and *United States vs. Cameron, et al.*, 15 Federal Reporter, 794 (1883), and stated in 1 Foster's Federal Practice (2d Ed.), Section 288, p. 518.

"The Judiciary" constitutes Title XIII of the Revised Statutes of the United States. "Evidence" forms the seventeenth chapter of this title. An examination of the fifty-two sections contained in this chapter shows that both criminal and civil cases are covered by its language. The question hinges upon a construction of the words "in any case," and "any of the courts of the United States." The words, "any case," according to their natural, as well as their technical import, would include both civil and criminal cases. The words, "any court of the United States," according to their natural and technical meaning, would include District courts of the United States. It is a first rule of interpretation that that is not to be interpreted or construed, which is plain. *Lake County vs. Rollins*, 130 U. S., 662, 670 (1889); *Woodbury vs. Berry*, 18 Ohio St., 456 (1869); *Diem vs. Millikin*, 6 Ohio Circuit Court Reports, 357 (1892); *Shellenberger vs. Ransom*, 59 N. W. Rep., 935 (1894); *United States vs. Hartwell*, 6 Wall, 385, 396 (1867); *United States vs. Wiltberger* 5 Wheaton, 76, 95–96 (1820); *Bate Refrigerating Co. vs. Sulzberger*, 157 U. S., 1, 36–37 (1895); *Thornley vs. United States*, 113 U. S., 310, 313 (1885); Maxwell on Interpretation (3d English Ed., 1896), 4; Black on Interpretation, pp. 1, 8, and 15; Sutherland on Statutory Construction, Sec. 234, p. 309; Sec. 236, p. 312; Sec. 237, p. 312; Sec. 238, p. 315 Wilberforce Statute Law (English Ed., 1881), 99–100; Hardcastle on

Construction (2d English Ed., 1892), 76; Vattel Law of Nations (Edition of 1879), Book 2, Chap. 17, Sec. 262.

It was well said by *Mr. Justice Harlan*, in *Bate Refrigerating Co. vs. Sulzberger*, 157 U. S., 1 (1895), at pages 36–37, that:

"In our judgment, the language used is so plain and unambiguous, that a refusal to recognize its natural obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based on some supposed policy of Congress."

Applying this rule to the words "any case" and "any court" there is no need of interpretation or construction, and giving these words either their plain and ordinary meaning, or their technical meaning, they include criminal as well as civil cases; district as well as circuit courts.

In *United States vs. Cameron*, 15 Federal Rep., 794 (1883), *Judge McCrary* delivered a very elaborate opinion (in which *Treat, J.*, concurred) as to the application of this section to criminal cases.

Circuit Court Judge Pardee, who delivered the opinion of the Court in *United States vs. Wilder*, 14 Federal Reporter, 393 (1882), said:

"It is so abhorent to all ideas of justice, that a person charged with crime shall not have full opportunity to make his defense by witnesses, that although I am not prepared to hold that evidence taken as proposed in this case will be admitted on the trial, I am of the opinion that the commission and opportunity prayed for ought to be granted. Taking evidence in the manner asked in this case, may be, and probably is, unprecedented in the United States Courts in criminal cases, but I am informed is permitted in State Courts of Georgia, and is allowed by statute in other States. At all events, the Government can not be seriously prejudiced by allowing this commission, as it will, of course, be at the expense of the defendant, and its admissibility will be determined on the trial. When the evidence is taken and the case comes on for trial, its scope, force, and effect can be seen, and its admissibility to go before the jury determined, and if the defendant shall be deprived of his testimony before the jury because the law will not allow its consideration, and the defendant shall be convicted, the testimony will certainly be

considered by the Judge who shall be called upon to exercise the large discretion given by the statute, in imposing sentence in the case. Let the commission issue as prayed for; the District Attorney to be served with the interrogatories to be propounded to witnesses, and to have three days thereafter to file cross-interrogatories, and the commission to be returned ten days before the next term of this Court."

In Foster Federal Practice (2d Ed.), Sec. 288, p. 518, it is stated that this section applies to criminal cases.

It was urged by the learned Assistant Attorney-General that Sec. 866 of the Rev. Stat. was taken from Section 30 of the Judiciary Act of September 24, 1789, Chapter 20, 1 Stat., pages 88–90. Where the language of a Revision is plain and unambiguous, it is improper to resort to an original statute for the purpose of raising a doubt, and then clearing up the doubt by the original statute. The condition precedent to the right to resort to a law not in force is the existence of an ambiguity in the law in force. *United States vs. Bowen*, 100 U. S., 508 (1879); *Arthur vs. Dodge*, 101 U. S., 34, 36–37 (1879); *Vietor vs. Arthur*, 104 U. S., 498, 499 (1881); *Deffebach vs. Hawke*, 115 U. S., 392, 402 (1885); *Cambria Iron Co. vs. Ashburn*, 118 U. S., 54, 57 (1886); *United States vs. Lacher*, 134 U. S., 624, 626–627 (1890); *Bate Refrigerating Co. vs. Salzberger*, 157 U. S., 1, 39 (1895). An intention is plainly manifest to include both civil and criminal cases in the words "any case." Since the original Judiciary Act of September 24, 1789, 1 Stat. at L., 73–93, almost every State of the Union had passed a statute permitting the taking of depositions by a defendant in criminal cases, and it was but natural that when it came to revise the entire body of statute law that the progress of the cause of humanity, right, and justice should manifest itself in the written law. The argument of the learned Assistant Attorney-General is fully answered by *Mr. Justice Harlan* in *Bate Refrigerating Co. vs. Salzberger*, 157 U. S., 1 (1895), at page 39, to wit:

"Another suggestion in behalf of the plaintiff is, that in the case of a revision of statutes, neither changes of phraseology nor a different arrangement of clauses in themselves show an intention to change or alter the existing law; that the new law should be held to mean what the prior law meant, unless a purpose to change or alter is manifested by clear, unambiguous language, and that, in the interpretation of any particular part of a revision, resort may be had to the previous law on the subject, whenever the revisers have not, in explicit language, disclosed their meaning. The circumstances under which the courts may look at prior laws, for which a revision has been substituted, are stated in *United States vs. Bowen*, 100 U. S., 508, 513. That case depended upon the construction to be placed upon certain sections of the Revised Statutes. *Mr. Justice Miller*, speaking for the Court, said:

'The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873. When the meaning is plain, the courts can not look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress.'"

In *United States vs. Bowen*, 100 U. S. 508 (1879) the matter is thus put by *Mr. Justice Miller* (pp. 512–514):

"The question, therefore, is whether we shall read the section 'all pensioners' or 'all *such* pensioners.'

"The word, however, as there used, has an appropriate reference to the class of pensioners who have not contributed to the funds of the institution, and no sound canon of construction will authorize us to disregard it, where to do so changes very materially the meaning of the section.

"It is urged, in opposition to this view, that, as the law stood prior to the revision, as shown by the act of March 3, 1859 (11 Stat. 431), *all* invalid pensioners who accepted the benefit of the home were bound to surrender to its use their pensions while there, and it must be conceded that such was the law.

"But as the revision embraces that act as well as all others on the subject, it is, by the express language of the repealing clause—Sec. 5596—no longer in force. Counsel for Govment, admitting that it is no longer in force, independently of the section of the revision which we are called on to construe, insist that a resort may be had to the law which was the subject of revision, to interpret anything left in doubt by the language of the revisers.

"This principle is undoubtedly sound; and, where there is a substantial doubt as to the meaning of the language used in

the revision, the old law is a valuable source of information. The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873. When the meaning is plain, the courts can not look to the statutes which have been revised to see if Congress erred in that revision, but may do so when neeessary to construe doubtful language used in expressing the meaning of Congress. If, then, in the case before us, the language of Sec. 4820 was fairly susceptible of the construction claimed by the Government, as well as of the opposite one, the argument from the provision of the statute as it stood before the revision would be conclusive. But, for the reasons already given, we are of opinion that the reasonable force of the language used in that section, taken in connection with the whole of the chapter devoted to that subject, and the accepted canons of interpretation, leave room for no other construction than that only invalid pensioners who had *not* contributed to the funds of the Soldiers' Home were bound to purchase its benefits by surrendering to it their pensions."

In *Deffeback vs. Hawke*, 115 U. S., 392 (1885), *Mr. Justice Field* said (p. 402), that:

"No reference, . . . can be had to the original statutes to control the construction of any section of the Revised Statutes, when its meaning is plain, although in the original statutes it may have had a larger or more limited application than that given it in the revision."

Applying these simple rules to Section 866 of the Revised Statutes, the conclusion necessarily follows that the words "all cases" include criminal cases as well as civil cases, and that resort can not be had to Section 30 of the act of September 24, 1789, to give them a more limited meaning.

Even if it be conceded that it is proper to look to Section 30 of the Judiciary Act of September 24, 1789, 1 Stat. at L., 90, the conclusion does not follow that the right did not exist to take depositions in criminal cases prior to the revision of 1874. Said Section 30, after providing for the manner of adducing evidence, contained a proviso that nothing therein contained should be construed to prevent "any court" from granting a *dedimus potestatem*. Its language is broad enough to cover

criminal cases as well as civil cases. *United States vs. Cameron*, 15 Fed. Rep., 794, 795–796 (1883).

Second.—The learned Trial Court gave as a second reason for refusing the application, that the circumstances did not call for its application *at that time*. Captain Loesewitz's name appeared indorsed upon the indictment as the prosecuting witness. It was a case of oath against oath. It would become very important to impeach his testimony by documentary evidence and testimony of his bad reputation for truth and veracity. It was proper to show his business relations with the New Jersey merchant, with whom he admitted he had long relations of friendship (original record, pp. 72–73; printed, p. 31), and from whom Captain Loesewitz obtained a business card (original record, pp. 73–74; printed, pp. 31–32), which Captain Loesewitz gave to Mr. Van Hammelrick (original record, p. 75; printed, p. 32). He also testified that upon the package he received from Mr. Van Hammelrick at the Café Alsacienne he wrote an address (original record, p. 78; printed, p. 34), while the package seized had no address upon it (original record, p. 95; printed, p. 44). He also testified that he hoped to better his own chances of getting off by testifying against Mr. Herman Keck, plaintiff in error (original record, p. 90; printed, p. 42).

The Court further stated that Herman Keck could have procured the presence of these witnesses from Europe. In this the learned Trial Court was clearly mistaken, because there was no evidence that they would cross the ocean, and it is not to be supposed that the business men mentioned in the affidavit, or Mr. Van Hammelrick, who was accused by Frank Loesewitz with being mixed up in the transaction, would come to America; and, in addition, there were other witnesses, whose names Mr. Herman Keck could not then give; and there was documentary evidence, information of which he had just received. The learned Trial Court further stated that the application came too late, as it might have

been made months before. In this the learned Trial Court was clearly mistaken, both in law and in fact, because the indictment was returned eight days before the application was made, and Mr. Herman Keck was arraigned on the 27th day of May, 1896, the day of the second refusal of the application and the day following the first refusal thereof. To be sure, Mr. Keck had been arrested February 14, and bound over to the Grand Jury March 18, and indicted May 18, 1896. He was not compelled to anticipate an indictment, and had a right to rely on the protection of Article VI of the Amendments to the Constitution, that he could not be called upon *to answer* to a criminal charge until accused by the indictment of a Grand Jury. The Constitution, statutes, and rules of procedure are to be construed together. *Kentucky Railroad Tax Cases*, 115 U. S., 321, 334 (1885).

If it be said that this was a matter within the discretion of the Trial Court, that discretion was grossly abused, and the conclusions of the learned Trial Judge in his attempted exercise of discretion was based upon erroneous conceptions of clear and admitted facts appearing upon the records of his own court.

The United States District Attorney claims he had no notice, but that he did have, is shown by his asking and obtaining leave of Court to file an answer (original record, p. 54; printed, p. 20), which was done.

It was unnecessary, as set forth in the answer of the District Attorney, that he should have been furnished with interrogatories, because the interrogatories are prepared and filed after the making of an order allowing the *dedimus*, as was done in the case of *United States vs. Wilder*, 14 Federal Reporter, 393 (1882). The same rule is laid down in 1 Foster's Federal Practice (2d Ed.), Section 288, p. 518. At all events, the Court overruled the application upon two grounds mentioned in the answer, filed by the United States District Attorney, and virtually thereby overruled the other grounds.

Nor, as contended by the learned District Attorney, does the manner of granting depend on common usage, but, as the statute says, the taking of the evidence, after the *dedimus* is issued, is to be according to common usage. (Rev. Stat. U. S., Sec. 866.)

Section 866 of the Revised Statutes of the United States provides for the issuing of a *dedimus potestatem* in any case where it is necessary, in order to prevent a failure or delay of justice. The affidavit filed made out a *prima facie* case for a *dedimus*. The Court did not rule or find that it was not necessary in order to prevent a failure or delay of justice. If it had assigned this reason, a more difficult question might have arisen. But the Court gave other reasons for its refusal. Of course, we concede that the Court said that the application might have been made months before, and all delay in consequence of granting it avoided, but as the Court was laboring under a misapprehension of law and fact, an error was committed, and the action of the Court was not the exercise of discretion. The Court committed an error.

IX.

Sentence Erroneous.

(1) Revised Statutes of the United States, Section 5541, only authorizes a sentence of imprisonment in the penitentiary within the district or State where the court is held where the sentence is for a period longer than one year. If the sentence be for one year, the Court has no power under said Section 5541.

(1a) Where a person was indicted and convicted for a violation of Section 2865 and Section 3082 of the Revised Statutes of the United States, for smuggling and importing contrary to law, in the United States District Court for the Eastern District of Pennsylvania, and sentenced for a period of one year, the Court has no power to order his confinement and imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania.

(1b) Where there is a valid sentence as to a fine and an invalid sentence as to the imprisonment, and the Court has power to impose fine or imprisonment, the one can be separated from the other, and a reviewing court will affirm as to the fine, issue a mandate to that effect, and declare the imprisonment void.

The Court having overruled a motion for a new trial, proceeded to pronounce sentence (original record, p. 45; printed, pp. 15–16) as follows, to wit:

"And thereupon, on the 9th day of June, A. D. 1896, all and singular, the premises being seen and by the Court here fully understood, it is considered and adjudged that the defendant, Herman Keck, pay to the United States a fine of $200.00; that he be imprisoned and confined in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year; that he pay the costs of prosecution, and stand committed until judgment be fully complied with, and that he be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of said Commonwealth."

Revised Statutes of the United States, Section 5541, provides that in every case where any person is convicted of any offense against the United States, is sentenced to imprisonment *for a period longer than one year*, the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held. Supreme Court of the United States, in *Bonner's case*, 151 U. S., 242 (1894), held, that imprisonment in the said penitentiary was only permissible where the sentence was for a period longer than one year. In the case on trial the sentence was not longer than one year, and was but for one year and the payment of a fine. In the case cited the Court held that the sentence was null and void, as being beyond the power of the Court, and discharged the petitioner on a writ of *habeas corpus*. The same conclusion was reached in the case of *In re Mills*, 135 U. S., 263, 270 (1890).

In the case at bar the judgment consisted of two distinct parts, the first, a fine of $200.00 and the costs of the prosecution; the second, imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year. Each part was capable of being separated from the other because the act of February 27, 1877, 19 Stat. 247, amending Section 2865 of the Rev. Stat. provides for fine *or*

imprisonment *or* both. The Court proceeded to impose a valid fine, which it had power to impose without imprisonment, and then proceeded to impose an invalid imprisonment. That they are separate, distinct, and severable is further apparent from the fact that one bond is taken on writ of error for the fine and the cost (original record, pp. 231–232; printed, pp. 121–122); and a separate bond on writ of error for the imprisonment (original record, p. 234; printed, pp. 122–123). In case the judgment of the lower court be affirmed, it is proper to affirm the judgment as to fine and cost and declare it null and void as to the imprisonment and issue a mandate to the trial court affirming the judgment as to the fine and costs and order execution thereon. *United States vs. Pridgeon*, 153 U. S., 48, 62 (1894). In this case *Mr. Justice Jackson* (at p. 62) said:

"The principle is established that where a court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack. In other words, the sound rule is that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence."

And again (at p. 63):

"It may often occur that the sentence imposed may be valid in part and void in part, but the void portion of the judgment or sentence should not necessarily, or generally, vitiate the valid portion."

X.

In Conclusion.

The three counts of this indictment were fatally defective, omitted matters of substance, and stated no crime. All ways of raising this insufficiency were taken, including a demurrer. The defendant was rushed into a trial eight days after his accusation, and denied the privilege of taking testimony in Europe, where the main transaction was alleged to have taken place, where the prosecuting witness lived, whose testimony it was desired to impeach. The application for a *dedimus potestatem* was denied upon conclusions based upon premises, fallacious in law and fact. The case was oath against oath, and turned up on imperfect identification. The only witness, who was under indictment, testified in hopes of bettering his own chances of getting off, and contradicted himself in important particulars. The *corpus delicti* was unproven.

Special instructions were modified to exclude, in effect, the doctrine that all the evidence must be consistent with a reasonable hypothesis of guilt and inconsistent with a reasonable hypothesis of innocence. An illegal sentence was imposed. Vital errors, prejudicial to the rights of Mr. Herman Keck, plaintiff in error and a citizen of the United States, were committed, and he was denied a fair and impartial trial, guaranteed to him by the Constitution of the United States while an alien was shielded from attacks as to his veracity and criminality. To quote from a brief of *Mr. Solicitor-General Conrad*, as did *Mr. Justice Peckham* in the *Tla-Koo-Yel-Lee Case*, 167 U. S., 274, 278 (1897), "the mind is oppressed with a painful doubt as to the soundness of the verdict returned by the jury." The conviction should be set aside, the indictment quashed, and Mr. Herman Keck freed from an annoying prosecution, so that he might go about his way develop-

ing the new and great diamond cutting industry at Cincinnati, which he attempted to bring to the attention of the Court by his *dedimus potestatem* and the excluded evidence of the witness, Mr. Franz Van Reeth.

Respectfully submitted,

RANKIN DILWORTH JONES,
FRANCIS BACON JAMES,

Counsel for Herman Keck, Plaintiff in Error.

CINCINNATI, October 9, 1897.

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Brief of Plaintiff in Error in Reply

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THE UNITED STATES OF AMERICA.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 194.

OCTOBER TERM, 1896.

No. 551.

HERMAN KECK, Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

RANKIN DILWORTH JONES,
FRANCIS BACON JAMES,
Counsel for Plaintiff in Error.

JONES & JAMES, Attorneys.

(16,330.)

JUDD & DETWEILER, PRINTERS.

THE UNITED STATES OF AMERICA:

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

HERMAN KECK, *Plaintiff in Error*, *vs.* THE UNITED STATES, *Defendant in Error.*	No. 194, Oct. Term, 1897. No. 551, Oct. Term, 1896. (16,330.)

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO BRIEF OF DEFENDANT IN ERROR.

MAY IT PLEASE THE COURT:

On the first argument of this case the learned Assistant Attorney General (*Mr. Whitney*) in open court abandoned the first count of the indictment, and stated that in view of its clear insufficiency counsel for plaintiff in error need not argue it. In view of this statement of the learned Assistant Attorney General, the revised brief on the re-argument does not very fully analyze the count. The present learned Assistant Attorney General (*Mr. Hoyt*) now brings forth a most exhaustive brief, in which he claims the sufficiency of the first count of the indictment. In reply we respectfully submit the following brief, to wit:

First count insufficient.

We will discuss the first count under three heads, to wit:

FIRST. The facts set forth in the first count of the indictment charge no crime.

SECOND. The omissions in the first count of the indictment cannot be supplied by a bill of particulars.

THIRD. The defects are not cured by section 1025 of the Revised Statutes of the United States.

I.

FIRST. *The facts set forth in the first count of the indictment charge no crime.*

The first count of the indictment is set forth at page 23 of our revised brief, and the statute on which it is based at pages 23 and 24.

Said count is defective in this:

(*a.*) *Diamonds are on the free list.* (Revised Brief, pp. 29–31.)

(*b.*) *If diamonds be not on the free list, as some diamonds are undoubtedly on the free list, the indictment should have fully, directly, and expressly named a kind of diamonds which are the subject of duty.* (Revised Brief, pp. 31–38.)

Every act is presumed to be lawful unless by allegations of *fact* it is charged to have been done under circumstances making it unlawful. In this case it is alleged that the defendant "imported * * * 563 diamonds * * * of the value of $10,000, contrary to law." It is urged by the learned Assistant Attorney General that the diamonds are identified by the prefix "563" and the suffix "of

the value of $10,000." But the prefix and suffix do not individuate the "diamonds." The prefix and suffix apply equally to *diamonds* mentioned in paragraph 467 of the act of August 27, 1894 (28 Stat., 509, 539), given at page 30 of the Revised Brief, which places certain kinds of diamonds on the free list, and as to which no crime can be committed. You can equally say "563" of "diamonds" on the free list as of diamonds on the dutiable list. You can equally say, "of the value of $10,000.00" of diamonds on the free list as of diamonds on the dutiable list. Words of number and value were in the indictments condemned in *Regina vs. Thomas Cox*, 1 Carrington & Kirwin, 494 (1844); Revised Brief, p. 33; and *State vs. Krider*, 78 N. C., 481 (1878); Revised Brief, p. 35. There are no words of description, no prefix or suffix, to the word "diamonds" which would signify a *kind* of diamonds mentioned in the dutiable list. Paragraph 467 is the only place the word diamonds *eo nomine* is mentioned in the tariff law of August 27, 1894 (28 Stat., 509, 539). Paragraph 338 (28 Stat., 509, 534), given at page 29 of the revised brief, provides for a duty on "precious stones." Cut precious stones not set are dutiable at 25 per cent.; uncut precious stones at 10 per cent.; cut precious stones, if set, at 25 per cent.; imitation precious stones, not set and not exceeding an inch in diameter, ten per centum.

In this indictment the word *diamond* is not individuated. It is not described as a precious stone or a diamond subject to any specific rate of duty, or by any of the various names by which diamonds or dutiable precious stones are known and which are referred to in the Revised Brief, page 32; nor is even the bare, naked, barren, legal conclusion inserted that they were subject to duty by law. (See remarks of *Mr. Justice Brewer*, at page 190, in *Dunbar vs. United States*, 156 U. S., 185, 190 (1895).)

It therefore follows that no words were inserted in the indictment describing a kind of diamond as to which a

crime could be committed, and these omitted words could not be supplied by inference, argument, or intendment, and therefore no crime was charged to have been committed.

In *Regina vs. Thomas Cox*, 1 Carrington & Kirwin, 494 (1844), Revised Brief, p. 33, an indictment for stealing "eggs" was condemned because there were some eggs the subject of larceny and some not, and the indictment omitted words describing eggs of a kind which were the subject of larceny. The indictment gave (as in the case at bar) the number of eggs as three and their value as two pence, but did not say *guinea* eggs, as the evidence showed them to have been.

In *State vs. Krider*, 78 N. C., 481, (1881), Revised Brief, p. 35, an indictment for stealing "fish" was condemned because there were some fish the subject of larceny and some not, and the indictment omitted words describing fish of a kind which were the subject of larceny. The indictment (as in the case at bar) gave the number of fish as five, and the report of the case showed that a value was stated in the indictment (page 481).

In *Commonwealth vs. Chase*, 125 Mass., 202, 203 (1878;) Revised Brief, pp. 44–45, 49, *Mr. Chief Justice Gray* condemned an indictment, charging the adulteration of "confectionery." The quantity (as in the case at bar) was described as one pound, and its quality as for food. (See cases and text books cited.)

In *United States vs. Cruikshank*, 92 U. S., 542 (1875), S. C. Beale's Cases on Criminal Law, 28 (Revised Brief, pp. 35–37), *Mr. Chief Justice Waite* held bad an indictment that charged the defendant with depriving persons of their "rights." He held that a specific right should have been alleged, so that the court might determine from the *facts* alleged whether a crime was charged.

In *United States vs. Morrissey*, 32 Fed. Rep., 147 (1887), Revised Brief, pp. 41, 42, the indictment described acts equally applicable to a State or Federal election, and as the

indictment did not positively point to a vote received for a Congressman, *Mr. Circuit Judge Brewer* held it bad. (See this case analyzed, Revised Brief, pp. 41, 42.) The same conclusions in a similar case were reached by *Mr. Justice Harlan* in *Blitz vs. United States*, 153 U. S., 308, 315 (1894); Revised Brief, pp. 55, 56.

In *Moore vs. United States*, 160 U. S., 268, 274, 276 (1895), it is held by *Mr. Justice Brown* that an indictment for embezzlement was bad which charged that defendant "did embezzle the sum of $1,652.59, money of the United States, of the value, etc., said money being the personal property of the United States."

An indictment must on its face, by allegations of *fact*, show that a crime was committed. *Mr. Chief Justice Waite* in *United States vs. Cruikshank*, 92 U. S., 542, 556, 558 (1875); *Mr. Justice Gray* in *United States vs. Carll*, 105 U. S., 611, 612, 613 (1881); *Mr. Justice Woods* in *United States vs. Britton*, 107 U. S., 665, 669 (1882); *Mr. Justice Field* in *United States vs. Hess*, 124 U. S., 483, 486, 487, 488 (1888), and *Mr. Justice Brown* in *Moore vs. United States*, 160 U. S., 268, 270 (1895).

If every kind of diamond were dutiable and there were no kind of diamond on the free list, a different question might possibly be presented, because then to say "diamond" would mean a dutiable article.

The fallacy of the argument of the learned Assistant Attorney General consists in assuming the very point at issue, namely, that the first count of the indictment charges a crime, and, having assumed that a crime is charged, he argues that, the count being indefinite, the remedy was other than by demurrer.

(c.) *This count violates article VI of the Amendments to the Constitution of the United States.*

The accused has the constitutional right to be informed of the nature and cause of the accusation under article VI,

amendments to the Constitution of the United States. In *United States vs. Cruikshank*, 92 U. S., 542 (1875), an indictment charging defendant with depriving certain persons of their "rights" was held to violate this constitutional provision. In *Commonwealth vs. Chase*, 125 Mass., 202, 203 (1878), an indictment which charged the adulteration of "confectionery" was also held to violate the constitution of Massachusetts, which contains a provision similar to article VI of the amendments to the Constitution of the United States. The court is also referred to *Commonwealth vs. McCance*, 164 Mass., 162 (1895); *People vs. Cox*, 40 Cal., 275 (1870); 1 Bishop New Criminal Procedure (4th ed., 1895), sections 98*a*, 100*a*, 101, 108, and 111, and to Revised Brief, pp. 36, 37, and 49.

(*d.*) *This count of the indictment does not allege what law the importation was contrary to.*

We have already discussed this question in our Revised Brief, pp. 23–26.

The argument of the learned Assistant Attorney General is fully answered by *Mr. Chief Justice Waite* in a part of his opinion in *United States vs. Cruikshank*, 92 U. S., 542, 557, quoted in the Government's Brief, pp. 10, 11.

It is suggested by the learned Assistant Attorney General (his Brief, pp. 7–9) that section 3082, Revised Statutes, was intended to cover smuggling. While section 3082 constituted section 4 of the act of July 14, 1866 (14 Stat., 179), that statute contained some 44 sections, and was entitled "An act to further prevent smuggling and other purposes." As the language of the section is clear and unambiguous, there is no necessity to resort to the title of the act. Its meaning is plain, and it is a condition precedent to a right to resort to the title that an ambiguity exist. Even if we resort to the title, and even if we concede that section 3082 was intended to include the crime of

smuggling, punished by section 2865, Revised Statutes, the position of the learned Assistant Attorney General is not sustained. On the contrary, it destroys his position, because to constitute the crime of smuggling under section 2865, Revised Statutes, eight (8) elements must co-exist (which we have heretofore set out in the Revised Brief, pp. 65, 66). This count is signally wanting, in that it omits the first, third, fourth, fifth, sixth, and eighth of these elements. It omits more than it inserts. This count of the indictment does not allege even by a bare, naked, and barren conclusion that the diamonds were subject to duty, or that the duty was not paid, or that they should have been invoiced, or that the invoice was omitted, or that any act was done with intent to defraud the *revenue* of the United States. There is a bare allegation to defraud the United States, but there are other ways to defraud the United States than of its revenue.

It is next contended (Brief, p. 8) that there might be other laws, and that "contrary to law" might apply to sections 2809 and 2814, Revised Statutes; but there are no allegations in the indictment that the defendant was the master of a vessel, or other allegations of fact. These sections provide distinct penalties for the acts and omissions which they punish.

(e.) *The rulings in the cases cited have not been overruled by the Dunbar Case.*

In the Revised Brief, p. 24, a number of cases have been cited wherein similar indictments were condemned. The learned Assistant Attorney General reviews them in his brief, but nowhere attempts to distinguish them. He ends up at page 10 with a sweeping statement that they are overruled by the *Dunbar* case. An examination of the nine counts of the indictment set forth in the report of the case of *Dunbar vs. United States*, 156 U. S., 185 (1895), drawn under section 3082 of the Revised Statutes, shows that they are

drawn with great particularity, setting forth all of the elements, and not a mere statement of conclusions and barren of facts, as is the first count of this indictment. Instead of militating against our position, the *precedent* of the indictment in the *Dunbar Case* sustains us.

(*f.*) *The facts in the Dunbar Case are clearly distinguishable from the case at bar.*

We have already pointed out in the Revised Brief, pp. 38–40, the distinction between the case of *Dunbar vs. United States*, 156 U. S., 185 (1895), and it is unnecessary to repeat the arguments there made.

(*g.*) *An indictment is not good unless the facts constituting the crime are set forth accurately, fully, and clearly, without uncertainty and ambiguity.*

Laws creating crimes must be explicit, so that all men may know what acts to avoid; *and an indictment must directly set forth facts bringing the accused plainly and unmistakably within the statute. United States vs. Brewer*, 139 U. S., 278, 288, (1891). The indictment must, by allegation of *fact*, set forth all the elements of the offense, without any ambiguity or uncertainty, and not by conjecture, inference, or implication. (See cases cited, Revised Brief, pp. 33–38, 52–56.) This count of the indictment clearly violates all of these rules.

II.

THIS COUNT CANNOT BE HELPED BY A BILL OF PARTICULARS.

It is earnestly contended by the learned Assistant Attorney General (in his Brief, pp. 17–22) that the remedy of the defendant was by bill of particulars. The only cases where a defendant is driven to a bill of particulars is where the

indictment states a crime. The learned Assistant Attorney General assumes as the premises of all of his arguments that the indictment does state the crime. As the premises is fallacious, his conclusions necessarily fail.

Article V of the amendments to the Constitution of the United States provides that no person shall be held to answer a capital or otherwise infamous crime except upon the *indictment of a grand jury.*

Article VI provides that the indictment shall inform the defendant of the nature and cause of the accusation. This has been construed by the Supreme Court of the United States in *United States vs. Cruikshank*, 92 U. S., 542, 557, 558 (1875), and by the supreme court of Massachusetts in *Commonwealth vs. Chase*, 125 Mass., 202, 203 (1878), where similarly drawn indictments were held not to state crimes because in violation of these constitutional limitations.

It is stated with great force in 1 Bishop New Criminal Procedure (4th ed., 1895), that—

"SEC. 646. *The bill of particulars not being made by the grand jury on oath cannot supply any defect in the indictment.*

"Nor in reason should the court suffer any otherwise insufficient allegation to pass on the ground that it has power to order *particulars* from a person not of the grand jury."

The same writer, at section 643, lays it down that the defendant is only driven to a bill of particulars *when an indictment cannot be pronounced ill by the court.*

In the case of *Ex parte* Bain, 121 U. S., 1 (1886), the trial court struck a line from the indictment as surplusage, and the Supreme Court of the United States liberated the defendant upon the ground that the court had lost jurisdiction, because the indictment with the line stricken out was "indictment by district attorney" and not "indictment by grand jury." The opinion of the learned justice who delivered the opinion of the court fully refutes the position of the learned Assistant

Attorney General. The position of the learned Assistant Attorney General amounts to this, that this indictment, which omits a matter of substance and states no crime, could have been turned into a good indictment by the district attorney if the defendant had asked for six things, to wit: *first*, by asking what kind of diamonds they were; *second*, whether they were precious stones; *third*, whether they were subject to duty; *fourth*, what rate of duty; *fifth*, what law the alleged importation was contrary to; and, *sixth*, in what respect it was intended to defraud the United States. In other words, under the guise of a bill of particulars, he would have the defendant reindicted by an indictment in effect drawn by the district attorney, while the Constitution guarantees that no person shall answer a capital or otherwise infamous crime except upon indictment by a grand jury.

This contention would in effect abolish indictment by grand jury. *Ex parte Bain*, 121 U. S., 1 (1886); 1 Bishop, New Criminal Procedure (4th ed., 1895), sec. 643 and would overrule the cases of *Commonwealth vs. Chase*, 125 Mass., 202 (1878), and *United States vs. Cruikshank*, 92 U. S., 542 (1875), which has been cited, affirmed, and quoted with approval in *United States vs. Carll*, 105 U. S., 611, 612, 613 (1881); *United States vs. Hess*, 124 U. S., 483, 485, 486, 487 (1888), and *Moore vs. United States*, 160 U. S., 268, 274, 276 (1895).

The court is also referred to our Revised Brief, pages 42–45, where the subject of "Bill of Particulars" is also discussed.

Some cases are referred to in the Government's brief (pp. 19–22) where bills of particulars were permitted. It will be found in those cases that a reason is given for not entering into minute details, and that reason was that the matters omitted were too indecent to be spread upon the records of the court. In those cases where indictments omitting matter were sustained a reason was always given, either that the matter was too indecent to spread upon the records of

the court, as in *Durland vs. United States*, 161 U. S., 306; *Rosen vs. United States*, 161 U. S., 29, or that the names and addresses were unknown to the grand jury, as in the *Durland case;* or that the details were to the grand jury unknown *People vs. Bogart*, 36 Cal., 245 (1868). *United States vs. Claflin*, 13 Blatch., 178, 181 (1875). In *Dunbar vs. United States*, 156 U. S., 185 (1895), which we have discussed in our Revised Brief, pages 38–40 and page 45, the court suggested that *perhaps* a bill of particulars might have been asked for, but *Mr. Justice Brewer* only makes the suggestion *after showing that the indictment without a bill of particulars stated a crime.*

III.

THE DEFECTS ARE NOT CURED BY SECTION 1025 OF THE REVISED STATUTES.

We have already discussed section 1025 of the Revised Statutes in our Revised Brief, pp. 40–42, and that argument will not be repeated. In addition to the cases there cited we wish to refer to the following cases, where contentions similar to the present ones made by the learned Assistant Attorney General were disallowed by this court, to wit: *United States vs. Cruikshank*, 92 U. S., 542, 544–545, 546, 548-549, 557–559 (1875); *United States vs. Carll*, 105 U. S., 611, 612, 613 (1881); *United States vs. Hess*, 124 U. S., 483, 485, 486, 487, and *Moore vs. United States*, 160 U. S., 268, 274, 276 (1895).

There is nothing peculiar to the crime of smuggling, as elaborately argued by the learned Assistant Attorney General, which would cause a rule to be applied to it in any way different from the crimes of murder, embezzlement, larceny, etc.

First count of indictment—no proper conviction under it.

(*a.*) The first count of the indictment was duly demurred to as being insufficient in substance (Revised Brief, pp. 23–26), and being thus fatally defective, and having been duly demurred to, it could not be cured by a verdict induced by a charge of the court. (*Moore vs. United States*, 160 U. S., 268 (1895).)

(*b.*) It is next contended by the learned Assistant Attorney General (his Brief, pp. 22, 23) that the first count of the indictment, based on section 3082, Revised Statutes, is the same as the crime under section 2865, Revised Statutes. We have in our Revised Brief presented this question in three parts: *First*, that the facts do not constitute smuggling or clandestinely introducing (Revised Brief, pp. 65–82); *second*, that an attempt to smuggle or clandestinely introduce is not alleged (Revised Brief, pp. 82, 83); *third*, that if an attempt to smuggle has been properly alleged, the facts do not make out a case of an attempt (Revised Brief, pp 83–90). As we have stated, the word "smuggle" has a well-defined technical meaning (Revised Brief, pp. 49, 50, 66, and 71). It is a settled rule of interpretation that where a word has a well-defined technical meaning, that when said word is contained in a statute it shall be given that technical meaning (Revised Brief, p. 66). We have shown that the definition contained in the anti-moiety act does not apply except to that act (Revised Brief, pp. 71, 72), and, even if it did, a crime is not established by the evidence (Revised Brief, pp. 83–90). The court's especial attention was called to this matter by the request for special instruction number 5, set forth in the Revised Brief, pp. 85, 86.

The record discloses no possession by the defendant. According to the testimony of Captain Loesewitz, the package was handed to him by Mr. Von Hemmerick and was never in the possession of Mr. Keck.

The Second Count of the Indictment.

We have shown in the Revised Brief, pp. 26–59, that the second count of the indictment is insufficient. We have also shown by that the *Dunbar case* is clearly distinguishable. (Revised Brief, pp. 38–40.)

It is suggested in the Government's Brief (pp. 28, 29) that when Captain Loesewitz handed Revenue Officer Gallen the package that that was an overt act. In this he is mistaken, because, according to the testimony of Mr. Gallen (Record, p. 44), at the time Captain Loesewitz turned the package over to Mr. Gallen he knew him to be a Treasury Department agent. Therefore there was not at that time any overt act to take them ashore, but a submission of them to the revenue agent (Revised Brief, pp. 86, 87). In addition, the court charged the jury upon the hypothesis of the belief in the story told by Captain Loesewitz (Revised Brief, pp. 124–133), and in its response to request number 10 for special instructions, confined the inquiry to the smuggling charged, as testified to by Captain Loesewitz. (Revised Brief, pp. 134–136.)

IN CONCLUSION.

The other points referred to in the Government's brief are fully dwelt upon in the Revised Brief, and for convenience of reference the court is referred to the "Index to Brief" and the "Epitome of Brief" contained between pages I–XII, in our Revised Brief.

That "clandestinely introducing" is not sufficient (bottom page 51, Revised Brief); see also *Britton vs. United States*, 107 U. S., 665, 669.

Respectfully submitted.

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JANUARY 19, 1898.

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Brief of Plaintiff in Error

Brf. of Jones & James for P. E.

THIRD ORAL ARGUMENT.

Filed Oct. 13, 1898.

THE UNITED STATES OF AMERICA.

In the Supreme Court of the United States.

OCTOBER TERM, 1898,

No. 15.

October Term, 1897,
No. 194.

October Term, 1896,
No. 551.

HERMAN KECK, Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

RANKIN DILWORTH JONES,
FRANCIS BACON JAMES,
Counsel for Plaintiff in Error.

JONES & JAMES, Attorneys.

(16,330)

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EPITOME OF BRIEF.

I.—Smuggling Defined.

(1.) Revised Statutes (2d Ed.), Section 2865, punishing smuggling is Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565).—*Post* p. 5; pp. 6–8.

(2.) It is a first rule in the interpretation of statutes to determine what a legislative body means by what it has said.—*Post* p. 5; pp. 8–9.

(3.) The words of a statute must be understood in the sense which they bore at the time it was adopted.—*Post* p. 5; p. 9.

(4.) Where a word having a well-defined legal meaning at the time of the adoption of a statute is incorporated into a statute it must be given that meaning.—*Post* p. 5; p. 9.

(5.) Where a word having a well-defined meaning at common law at the time of the adoption of a statute is incorporated into a statute it must be given that meaning.—*Post* p. 5; pp. 12–15.

(6.) On the authority of Hawkins, Russell, Gabbet, and Bacon, August 30, 1842, smuggling meant "the bringing on shore or carrying from shore goods and merchandise for which the duty has not been paid or goods of which the importation or exportation is prohibited." When Congress, August 30, 1842, Section 19 (5 Stat., 548, 565), prescribed a punishment for smuggling, the word smuggling should be given its accepted meaning at that date.—*Post* p. 5; pp. 9–12.

II.—Rulings of Court Assigned for Error as to Smuggling thus Defined.

(1.) Criminal statutes are to be strictly construed, and cannot be extended by construction to cover cases not falling within their

terms. There are no constructive crimes. When Congress has not made an act punishable, a court cannot enlarge a statute. An act not within the language of a statute is not within the statute because it is of equal atrocity or of a kindred character with those acts which are enumerated. To say that a case is within a criminal statute because within its reason, is to legislate and not to interpret legislation. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, will justify any judicial addition to the language of a statute. A court, in interpreting a statute, cannot hold that Congress must have intended to do that which it has failed to do. Congress is presumed to know the meaning of words, and words are to receive their plain and literal meaning even though the intention of Congress may have been different from that expressed.—*Post* p. 15; pp. 21–25.

(2.) Obtaining diamonds in Europe with the intention of smuggling into America, omitting to get a consular invoice, placing them in a state-room on a steamship at Liverpool, omitting them from the steamship's manifest, steaming the ship into the high seas, steaming the ship into the port of Philadelphia, accompanied with an intention to smuggle, and not taking the diamonds on shore, while such acts may constitute the distinct offenses of omitting from the manifest, or importing contrary to law, or failing to produce the manifest, they do not constitute the crime of smuggling within the meaning of Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. (2d Ed.).—*Post* p. 16; pp. 25–28.

III.—The Definition in the Anti-moiety Act Does Not Apply.

(1.) What Congress means is to be determined by what Congress says. Sec. 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), defines smuggling "for the purposes of this act." Congress having thus given a definition of smuggling "for the purposes of this act," that definition can not be extended by implication or construction to another act. The same word used in several acts of Congress may have a different meaning in each act. Where Congress has defined a word "for the purposes of this act," courts are not at liberty to strike out these words or add the interpreting clause to another statute. The words are sensible, and have a decided influence on the meaning

of the act in which they are used, and to strike them out, or to ignore the words, "for the purposes of this act," and arbitrarily add this special interpreting clause of one act to another act is making very free with legislative language, and amounts to judicial legislation.—*Post*, p. 28; pp. 29–37.

(2.) The definition of the word smuggle, "for the purposes of this act," contained in the proviso to Sec. 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), can not be given the word smuggle in Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. (2d Ed.).—*Post* p. 28; pp. 29–37.

IV.—Rulings of Court Assigned for Error as to Smuggling Defined in the Anti-moiety Act.

(1.) If, contrary to our contention, the Court adopt the definition contained in the Anti-moiety Act, then the following eight (8) elements must co-exist to constitute a violation of Section 19 of the Act of August 30, 1842 (5 Stat. 548, 565), now Sec. 2865, Rev. Stat., to wit: (*a*) An *act* of getting goods into the United States without passing them through the custom-house; *or* an *act* of getting goods into the United States without submitting them to the officers of the revenue for examination; (*b*) goods, wares, or merchandise; (*c*) which should have been invoiced; (*d*) and as to which the invoice is omitted; (*e*) goods, etc., subject to duty; (*f*) the duty not being paid; (*g*) done knowingly and willfully, and (*h*) all with intent to defraud the revenue of the United States. No obligation arises to pay duty until after the vessel has come into port with intent to land. The *act*, therefore, necessarily refers to an *overt act* after an obligation has arisen to pay duty.—*Post* p. 37; pp. 42–48.

(2.) Obtaining diamonds in Europe with the intention of getting them into America without passing them through the custom-house, and without submitting them to an officer of the revenue for examination, placing them in a state-room on a steamship at Liverpool, omitting them from the steamship's manifest, steaming the ship into the high seas, steaming the ship into the port of Philadelphia with intent to land them, accompanied with an intention not to pass them through the custom-house and not to submit them to an officer of the revenue for examination, and a demand for the diamonds by a revenue

officer who did not make himself known as such, a refusal to deliver them to the revenue officer without an order, a failure to produce an order, and only delivering them to the revenue officer after the revenue officer had made himself known and had been identified as such, and then delivering them to him in his official capacity, does not constitute an *act* of getting the diamonds into the United States without passing them through the custom-house, or submitting them to an officer of the revenue for examination. A demand by a revenue officer, as such, for said diamonds, and a delivery thereof to him as such, do not constitute an *act* of getting diamonds into the United States without passing them through the custom-house or submitting them to an officer of the revenue for examination.—*Post* p. 38; pp. 48–51.

(3.) The Act of June 1, 1872 (17 Stat., 196, 198), now Sec. 1035, Rev. Stat., only permits a verdict of guilty of an attempt when the attempt is itself a separate offense. The statutes of the United States have never made an attempt to smuggle a separate offense.—*Post*, p. 38; pp. 51–52.

(4.) The interpreting clause contained in the proviso to Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), makes smuggling for the purposes of that act either (*a*) an act of smuggling actually completed, or (*b*) an overt act of an attempt to smuggle. This gives the word smuggle an unnatural meaning not in accordance with the common understanding of the word and contrary to the rules of grammar. The interpreting clause furnishes a rule for the interpretation of this statute, but not for the interpretation of the indictment. It, therefore, follows that an indictment for smuggling is not an indictment for attempt to smuggle, and an attempt to smuggle not being made a separate offense, there could be no conviction for an attempt to smuggle under said indictment.—*Post* pp. 38–39; pp. 52–54.

(5.) An attempt is an overt act of the same character as an act which would constitute a completed offense if not interrupted before its completion. An intent is not an overt act of attempt, and overt acts of preparation with intent do not constitute overt acts of attempt.—*Post* p. 39; 59–62.

(6.) The facts set forth in paragraph (2), above, do not constitute more than overt acts of preparation with an intent, and do not constitute overt acts of an attempt to smuggle.—*Post* p. 39; pp. 54–67.

V.—Smuggling is Not Importing Contrary to Law.

(1.) In interpreting the statutes of a government, full force and effect shall be given to each section of said statutes. In order so to do, courts will so construe one section as not to defeat, annul, or destroy another, but to explain and support it.—*Post* p. 68; pp. 68–70.

(2.) Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., punishes smuggling, and is necessarily confined to overt acts done after an obligation has arisen to pay duty, and, therefore, after the importation is complete. Section 4 of the Act of July 14, 1866 (14 Stat., 178, 179), now Sec. 3082, Rev. Stat., by its terms punishes importing contrary to law. It, therefore, pertains to unlawfulness in matters pertaining to the port, and not to overt acts after the importation is complete.—*Post* p. 68; pp. 68–72.

(3.) Therefore, smuggling is not importing contrary to law, but an offense distinct therefrom, and which can only arise after the importation is complete.—*Post* p. 68; pp. 68–72.

VI.—The Crime of Smuggling was Not Committed, Because the Law did Not Require an Invoice.

(1.) The offense of smuggling under Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., can only exist as to goods which the law requires to be invoiced.—*Post* p. 72; p. 73.

(2.) Sec. 4 of the Act of June 10, 1890 (26 Stat., 131), divided goods into two classes, (*a*) those which must be invoiced, and (*b*) those which need not be invoiced. Personal effects accompanying a passenger need not be invoiced.—*Post* p. 72; p. 74.

(3.) A Captain of a steamship does not cease to be a passenger by being a Captain, and he is not required to invoice goods which, when accompanying any other passenger, it would not be necessary to invoice.—*Post* p. 72; pp. 74–75.

(4.) A Captain of a steamship, who procured a package of diamonds in Antwerp, put it in his state-room at Liverpool, and steamed his ship into the port of Philadelphia, cannot be guilty of smuggling said diamonds, because the law did not require that they should have been invoiced.—*Post* p. 72; pp. 74–75.

VII.— Errors in Rulings as to the Corpus Delicti.

(1.) Without proof of the *corpus delicti* there can be no conviction in a criminal case; if the *corpus delicti* fail of identification, there can be no conviction in a criminal case.—*Post* p. 76; p. 76.

(2.) Where a captain testifies that he was given a package, the property of a stranger in Antwerp, and that he wrote thereon an address, and the package seized had no address thereon; and that he had been in the habit of bringing over small packages; and that he did, and that he did not, know the consignee; it is error for the Court to instruct the jury that they must find the defendant (who was the stranger referred to) guilty if they believe the *testimony* of the captain to be true.—*Post* p. 76; pp. 76–79.

THE UNITED STATES OF AMERICA.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

HERMAN KECK, *Plaintiff in Error.*	No. 15.	Oct. Term, 1898.
	No. 194.	Oct. Term, 1897.
vs.		
THE UNITED STATES, *Defendant in Error.*	No. 551. (16,330)	Oct. Term, 1896.

Brief of Plaintiff in Error on Third Oral Argument

MAY IT PLEASE THE COURT:

On the 25th day of April, 1898, this Court entered the following order, to wit:

"This case is restored to the docket for reargument, and assigned to be heard on the second Monday of next term. Counsel will be limited to one hour on each side, and their attention is directed to the question whether, assuming the diamonds to have been dutiable, the Circuit Court erred *in any of its rulings in respect of what constitutes the crime of smuggling, and in the application of the law to the evidence.*"

We therefore respectfully submit the following brief on the question suggested by the Court to be reargued, to wit:

Statement of the Case.

So much of the case as is pertinent to the question to be reargued, as suggested by the Court in its order of April 25, 1898, is as follows, to wit:

Action to Reverse.—This is an action (record, pp. 118–120) to reverse the judgment of the District Court of the United States for the Eastern District of Pennsylvania, whereby and wherein Mr. Herman Keck, plaintiff in error, was convicted by a jury (record, p. 12) of a violation of Sec. 2865 of the Rev. Stat. of the United States; and was, by the judgment of the Court, sentenced to pay a fine of $200 and be imprisoned and confined in the Eastern Penitentiary of the Commonwealth of Pennsylvania for a term of one year and pay the costs of prosecution (record, pp. 15–16).

Indictment.— On May 18, 1896, at the May Term, 1896, of the District Court of the United States, for the Eastern District of Pennsylvania, an indictment, containing three counts, the second only of which bears on the question directed to be reargued, was returned against Mr. Herman Keck, plaintiff in error (record, pp. 1–2).

Second Count.—The second count charged him with smuggling diamonds contrary to the provisions of Sec. 2865 of the Rev. Stat. of the United States (record, pp. 1–2).

Assignments of Error

The following are the assignments of error (record, pp. 114–118) pertinent to the question to be reargued, as suggested by the Court, to wit:

Tenth.—The Court erred in making the charge to the jury in refusing to state to said jury and give it the followiug instructions requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence introduced in this case to make out the charges against the defendant, Herman Keck, and they are therefore instructed to return a verdict of not guilty on the bill of indictment."

To which refusal so to instruct, the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Twelfth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the second count of the bill of indictment, and they are therefore instructed to return a verdict of not guilty as to the second count of the bill of indictment."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Thirteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instruction requested by the defendant, Herman Keck, to wit:

"The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same or putting the same on his manifest and delivering the same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged your verdict must be not guilty."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Sixteenth.—The Court erred in making the charge to the jury in refusing to state to it and give it the following instructions requested by defendant, Herman Keck, to wit:

"The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt; a preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt from the evidence that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence."

To which refusal to so instruct the defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court, and the Court there upon said it would give a modification of said instruction so requested, and defendant, Herman Keck, thereupon requested the Court to give said instruction as asked, which request the Court refused, and to which refusal and ruling of the Court defendant, Herman Keck, then and there excepted; which exception was then and there duly allowed by the Court.

Seventeenth.— The Court erred in charging the jury, among other things, as follows, to wit:

"It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

To which portion of said charge defendant, Herman Keck, then and there excepted while the jury was still at the bar of the Court.

ARGUMENT.

I.

SMUGGLING DEFINED.

(1) Revised Statutes (2d Ed.), Section 2865, punishing smuggling is Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565).—*Post pp. 6–8.*

(2) It is a first rule in the interpretation of statutes to determine what a legislative body means by what it has said.—*Post pp. 8–9.*

(3) The words of a statute must be understood in the sense which they bore at the time it was adopted. —*Post p. 9.*

(4) Where a word having a well-defined legal meaning at the time of the adoption of a statute is incorporated into a statute it must be given that meaning.—*Post p. 9.*

(5) Where a word having a well-defined meaning at common law at the time of the adoption of a statute is incorporated into a statute it must be given that meaning.—*Post pp. 12–15.*

(6) On the authority of Hawkins, Russell, Gabbet, and Bacon, August 30, 1842, smuggling meant "the bringing on shore or carrying from shore goods and merchandise for which the duty has not been paid or goods of which the importation or exportation is prohibited." When Congress, August 30, 1842, Section 19 (5 Stat., 548, 565), prescribed a punishment for smuggling, the word smuggling should be given its accepted meaning at that date.—*Post pp. 9–12.*

(*a*). *Second Count of Indictment.*

The second count of the indictment is as follows (record, pp. 1–2), to wit:

"And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations, do further present that afterwards, to wit: Upon the day and year aforesaid, the said Herman Keck, late of the District aforesaid,

yeoman, at the District aforesaid, and within the jurisdiction of this court, did knowingly, willfully, and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to wit: Into the Port of Philadelphia, certain goods, wares and merchandise, to wit: Five hundred and sixty-three diamonds of great value, to wit: Of the value of Ten Thousand Dollars, without paying and accounting for the duty imposed upon the said goods, wares and merchandise by the provisions of the act of Congress in such case made and provided, which said goods, wares, and merchandise so smuggled and clandestinely introduced, as aforesaid, were subject to duty by law, and should have been then and there invoiced, the said Herman Keck then and there well knowing that the duty due and payable upon the said goods, wares and merchandise had not been paid and accounted for, and that the said goods, wares and merchandise had not been invoiced as required by the provisions of the act of Congress in such case made and provided, with intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

(*b*). *Rev. Stat. (2d Ed.), Sec. 2865, is Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565).*

The second count of the indictment is drawn under the provisions of the Act of February 27th, 1877 (19 Stat., 240, 247), amending Sec. 2865, Rev. Stat. of the United States, to wit:

"SEC. 2865. If any person shall knowingly, and willfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass or attempt to pass through the custom-house any false, forged or fraudulent invoice, every such person, his, her or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court."

From the passage of the first act of Congress laying a duty on imports July 4, 1789 (1 Stat., 24), down to August 30,

1842, there was no Federal statute punishing smuggling. The Act of August 30, 1842 (5 Stat., 548), provided, among other things, as follows (p. 565), to wit:

"SEC. 19. *And be it further enacted*, That if any person shall knowingly, and willfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass or attempt to pass through the custom-house any false, forged or fraudulent invoice, every such person, his, her or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court."

This section created two crimes. They are thus stated by *Mr. Justice Nelson* in *United States vs. Sixty-seven Packages of Dry-Goods* (1854), 17 Howard, 85, 93, to wit:

"*It first makes the smuggling of dutiable goods into the country a misdemeanor;* and, secondly, the passing or attempting to pass them through the Custom House, with intent to defraud the revenue, by means of false, forged, or fraudulent invoices; the latter is an attempt which, in effect and result, is very much akin to that of smuggling, except done under color of conformity to the law and regulations of the customs."

Under the Act of June 27, 1866 (14 Stat., 74), the Statutes of the United States were revised. The Act of June 20, 1874 (18 Stat., 113), provided for their publication. The Revised Statutes were approved June 22, 1874, and took effect as of December 1, 1873. Rev. Stat. §§ 5595 and 5601; *United States vs. Bowen*, (1879) 100 U. S., 508, 513.

The Revised Statutes of the United States contained only the latter half of Section 19 of the Act of August 30, 1842 (5 Stat., 548), as Section 2865, as follows, to wit:

"SEC. 2865. Every person who makes out or passes, or attempts to pass through the custom-house any false, forged or fraudulent invoice, or who shall aid or abet in making or passing such false, forged, or fraudulent invoice, shall be

deemed guilty of a misdemeanor, punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than two years, or both, in the discretion of the court."

Under the provisions of Section 5596 of the Revised Statutes, the effect of embodying only the latter half of Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), in the Revised Statutes as Section 2865, was to repeal the first half of Section 19. This resulted in the repeal of the statute punishing smuggling. Being obviously an unintentional omission, Congress on February 27, 1877 (19 Stat., 240, 247), restored this portion of Section 19 of the Act of August 30, 1842. The Act of February 27, 1877 (19 Stat., 240), is entitled "An Act to perfect the Revision of the Statutes of the United States," etc., and its first section sets forth that it was enacted "For the purpose of correcting errors and supplying omissions in the act entitled 'An act to revise and consolidate the statutes of the United States in force on the first day of December anno Domini one thousand eight hundred and seventy-three,' so as to make the same truly express such laws, the following amendments are hereby made therein:" It then occupies fourteen printed pages. The result was, that between June 22, 1874, and February 27, 1877, there was inadvertently no Federal statute punishing smuggling.

The Act of March 2, 1877 (19 Stat., 268), provided for the preparation and publication of a second edition of the Revised Statutes of the United States, and Section 2865 as there printed is Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), in its entirety.

(*c*). *Rules and authorities for the interpretation of the word "smuggle."*

It is a first rule of interpretation to determine what a legislative body means *by what has said. United States vs. Wiltberger* (1820), 5 Wheaton 95–96; *Lake County vs. Rollins* (1889), 130 U. S., 662, 670 671; *United States vs. Gold-*

enberg (1897), 168 U. S., 95, 102–103; *Calderon vs. Atlas Steamship Co.* (1898), 170 U. S., 272, 280–281; Wilberforce Statute Law (1881), 102–104.

The question presented would be what meaning was attached to the word "*smuggle*" at the time of the adoption of this statute, August 30, 1842? In *Bridge Proprietors vs. Hoboken County* (1864), 1 Wallace, 116, 148, the question was as to the meaning of the word "bridge," used in a New Jersey statute of 1790. *Mr. Justice Miller* said, among other things (p. 148), that:

"It does not, therefore, follow that when a word was used in a statute or a contract seventy years since, that it must be held to include everything to which the same word is applied at the present day."

This was quoted and approved by *Mr. Justice Bradley* in *Bischoff vs. Wethered* (1869), 9 Wallace, 812, 816.

In Maxwell on Interpretation of Statutes (Third London Ed., 1896) 83, the rule is thus stated:

"The words of a statute must be understood *in the sense which they bore when it was passed.*"

The meaning attached to the word "*smuggle*" August 30, 1842, is shown by numerous authorities.

The first authority to which we refer is Hawkins' Pleas of the Crown, the first edition of which appeared in 1716, and subsequent editions in 1724, 1739, 1762, 1771, 1795, and later. William Hawkins occupied a high position at the bar and became a serjeant. He also published an abridgment of Coke on Littleton and a collection of the British Statutes-at-Large. Two editions of his Pleas of the Crown have come into our hands—the Seventh and Eighth London Editions.

Smuggling is thus defined in 1 Hawkins' Pleas of the Crown (7th London Ed., 1795), 487; (8th London Ed.), 661, to wit:

" Smuggling consists *in the bringing on shore*, or in carrying from the shore, goods, wares or merchandise, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited."

The second authority to which we refer is Russell on Crimes, the first edition of which appeared in 1819, and subsequent editions in 1827, 1843, 1851, 1865, 1877, and 1896. Russell occupied a high position at the bar and on the bench, becoming a serjeant and Chief Justice of Bengal, and was knighted as Sir William Oldnall Russell. In addition he published works on Practice and Fines and Common Recoveries.

The following is laid down in 1 Russell on Crimes (London Ed. of 1819), 160, to wit:

" Among the offenses against the revenue laws, that of smuggling is one of the principal. It consists *in bringing on shore*, or carrying from the shore, goods, wares or merchandise, for which the duty has not been paid, or goods of which the importation or exportation is prohibited."

The same definition is found at page 111 of the seventh American Edition of 1853, by Sharswood, from the third London Edition; at page 172, of the fourth London Edition of 1865; at page 270 of the fifth London Edition of 1877; at page 172 of the ninth American edition of 1877, by Sharswood; at page 277, of the sixth London Edition; and at page 277 of the International Edition of 1896. These are all of the editions which have come into our hands.

The third authority to which we refer is Gabbet's Criminal Law, which appeared in 1835. Joseph Gabbet was an author upon other subjects, and in 1812 published a Digestive Abridgment and Comparative View of the Statute Law in England and Ireland, analytically arranged on the order of Blackstone's Commentaries, and of which a second edition appeared in 1841.

The following is laid down in 1 Gabbet's Criminal Law (London Ed. 1835) 848, to wit:

"Smuggling is an offense against the revenue laws, which consists in *clandestinely bringing on shore* or carrying from shore goods, wares, or merchandise for which the duty has not been paid, or goods of which the importation or exportation is prohibited."

The fourth authority to which we refer is Bacon's Abridgment, the first edition of which appeared in 1736–1762, and subsequent editions in 1768–70, 1778, 1798, 1807, 1832, 1842–1856, and 1876. Matthew Bacon was also the author of a treatise on Leases and Terms of Years. The second American Edition of Bacon's Abridgment was edited by John Bouvier (author of the celebrated Law Dictionary), and appeared between the years 1842 and 1856 in ten volumes. Another of the Bouvier editions was published in 1876. It is said in Marvin's Legal Bibl. that "this work is probably in more general use in the United States than any other English Abridgment of the Common Law."

The following is laid down in 6 Bacon's Abridgment (5th Lond. Ed.), 258, to wit:

"Smuggling consists *in the bringing on shore* or carrying from the shore goods and merchandise, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited."

The same definition is found in volume 7, page 313, of the seventh London Edition of 1832, and in volume 9, page 106 of the American Edition of 1876 by John Bouvier, the only three editions which have come into our hands.

In *Dunbar vs. United States* (1895), 156 U. S., 185, 193, *Mr. Justice Brewer* said that smuggling is "the fraudulent taking into a country, or out of it, merchandise which is lawfully prohibited." There is nothing in this definition which conflicts with the authority of Hawkins, Russell, Gabbet, and Bacon. In this case it was claimed that all the counts in the indictment, except one, were insufficient because no *scienter* was alleged. To show that the word smuggle implied knowl-

edge, *Mr. Justice Brewer* gave the definition quoted. The Court did not have before it and did not decide whether taking on shore was or was not necessary to constitute smuggling, or whether the definition given meant or did not mean taking on shore. *Mr. Justice Brewer* cites 2 Bouvier, 528; Bouvier cites Bacon, Abr. *Smuggling;* and Bacon defines smuggling as already given (*ante*, p. 11). Two classes of cases fall within the term smuggling, as defined by Hawkins, Russell, Gabbet, and Bacon: (1) *Where it is not prohibited* to take goods on shore, but where a duty accrues upon bringing certain dutiable goods into port with intent to land, and to take such dutiable goods on shore without paying the duty constitutes smuggling; (2) *Where it is prohibited* to take certain named goods on shore, and to take such prohibited goods on shore constitutes smuggling. Bouvier gave but the latter half of Bacon's definition.

It thus appears that the word "*smuggling*" has a well-defined legal meaning. It is a rule of interpretation, that if a word used in a statute have a well-defined legal meaning, such word shall be given that meaning. *The Abbotsford* (1878), 98 U. S., 440, 444; *United States vs. Palmer* (1818), 3 Wheaton, 610, 630; *United States vs. Smith* (1820), 5 Wheaton, 153, 159–160; *United States vs. Davis* (1829), 5 Mason, 356; *Moore vs. United States* (1875), 91 U. S., 270, 274; *Smith vs. Alabama* (1887), 124 U. S., 465, 478–479; *United States vs. Wong Kim Ark* (1898), 169 U. S., 649, 653–654, 654, 655, 662, 679–680, 707; Black on Interpretation (1896), 130; Sutherland on Statutory Construction (1891), 331, 333; Wilberforce Statute Law (1881), 124–125; Hardcastle Construction of Statutes (2d Ed., 1892), 184–185; Maxwell on Interpretation (3d Ed., 1896), 2–3; 1 Kent's Commentaries, 462; *Grogan vs. Garrison* (1875), 27 Ohio St., 50, 63. And although there are no common-law crimes against the United States Government (*United States vs. Britton* (1883), 108 U. S., 199, 206; *United States vs. Eaton* (1892), 144 U. S., 677, 687), yet when a Federal

law prescribes a punishment for a common-law crime by name, without defining it, the common-law definition is impliedly adopted as part of the statute. *United States vs. Palmer* (1818), 3 Wheaton, 610, 630, 636, 640; *United States vs. Smith* (1820), 5 Wheaton, 153, 160; *United States vs. Davis* (1829), 5 Mason, 356, 362; *Swearingen vs. United States* (1896), 161 U. S., 446, 451; *Turner vs. State* (1853), 1 Ohio St., 422, 424–425; Black on Interpretation of Laws (1896), 130; *Mr. Justice Matthews* in *Smith vs. Alabama* (1887), 124 U. S., 465, 478–479; *Mr. Justice Gray* in *United States vs. Wong Kim Ark* (1898), 169 U. S., 649, 654, 655, 662, 679–680, and dissenting opinion of *Mr. Chief Justice Fuller* in the same case at page 707.

In *United States vs. Palmer* (1818), 3 Wheaton, 610, the defendant was indicted for robbery in violation of the Act of April 30, 1790 (1 Stat., 112–19). *Mr. Chief Justice Marshall* said, among other things (p. 630), that:

"Of the meaning of the term robbery, as used in the statute, we think no doubt can be entertained. It must be understood in the sense *in which it is recognized and defined at common law.*"

Mr. Justice Johnson, who delivered a concurring opinion, said (at p. 640) that:

"The second question proposed in this case is one on which, I presume, there can be no doubt. *For the definition of robbery under this act we must look for the definition of the term in the common law or we will find it nowhere;* and according to my construction super-add to that definition the circumstance of its being made punishable with death, under the laws of the United States, if committed on land, and you have described the offense made punishable under this section."

In *United States vs. Smith* (1820), 5 Wheaton, 153, *Mr. Justice Storey* (at pp. 159–160) said:

"But supposing Congress were bound in all the cases included in the clause under consideration to define the offense, still there is nothing which restricts it to a mere

logical enumeration in detail of all the facts constituting the offense. *Congress may as well define by using a term of a known and determinate meaning* as by an express enumeration of all the particulars included in that term. That is certain which is by necessary reference made certain.' When the Act of 1790 declares, that any person who shall commit the crime of robbery or murder on the high seas shall be deemed a pirate, *the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law.* In fact, *by such a reference, the definitions are necessarily included, as much as if they stood in the text of the act.* In respect to murder, where 'malice aforethought' is of the essence of the offense, even if the common-law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of 'malice aforethought' *would remain to be gathered from the common law.* There would then be no end to our difficulties or our definitions, for each would involve some terms which might still require some new explanation. Such a construction of the constitution is, therefore, wholly inadmissible. To define piracies, in the sense of the constitution, is merely to enumerate the crimes which shall constitute piracy; and *this may be done either by a reference to crimes having a technical name and determinate extent*, or by enumerating the acts in detail upon which the punishment is inflicted."

In *United States vs. Davis* (1829), 5 Mason, 356, the defendant was indicted for larceny in violation of the Act of April 30, 1790 (1 Stat., 112–119). *Mr. Circuit Justice Storey* (at p. 362), said:

"An indictment on the Act of 1790 lies only where the offense is committed in respect to the 'personal goods' of another. *To ascertain what is the meaning of these words we must resort to the common law, for that furnishes the proper rule of interpretation.*"

In *Swearingen vs. United States* (1896), 161 U. S., 446, the defendant was indicted for a violation of Sec. 3893, Rev. Stat. *Mr. Justice Shiras* said, among other things (p. 451), that:

"The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity, *and have the same meaning as is given them at common law in prosecutions for obscene libel.* As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit."

In Black on Interpretation of Laws (1896), 130, the rule is stated thus:

"Where a word or phrase has a clear, definite, and settled meaning at common law, it is to have the same meaning in the construction of a statute in which it is found."

It follows, therefore, that the word "*smuggle*," found in Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865 of the Rev. Stat., must be given the same meaning as that found in Hawkins, Russell, Gabbet, and Bacon, high authorities when this statute was adopted.

II.

Rulings of Court Assigned for Error as to Smuggling thus Defined.

(1.) **Criminal statutes are to be strictly construed, and cannot be extended by construction to cover cases not falling within their terms. There are no constructive crimes. When Congress has not made an act punishable, a court cannot enlarge a statute. An act not within the language of a statute is not within the statute because it is of equal atrocity or of a kindred character with those acts which are enumerated. To say that a case is within a criminal statute because within its reason, is to legislate and not to interpret legislation. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, will justify any judicial addition to the language of a statute. A court, in interpreting a statute, cannot hold that Congress must have intended to do that which it has failed to do. Congress is presumed to know the meaning of words, and words are to receive their plain and literal meaning even though the intention of Congress may have been different from that expressed.—** *Post*, **pp. 21–25.**

(2.) Obtaining diamonds in Europe with the intention of smuggling into America, omitting to get a consular invoice, placing them in a state-room on a steamship at Liverpool, omitting them from the steamship's manifest, steaming the ship into the high seas, steaming the ship into the port of Philadelphia, accompanied with an intention to smuggle, and not taking the diamonds on shore, while such acts may constitute the distinct offenses of omitting from the manifest, or importing contrary to law, or failing to produce the manifest, they do not constitute the crime of smuggling within the meaning of Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. (2d Ed.).—*Post*, pp. 25–28.

(*a.*) *The facts and the evidence.*

The only witness on behalf of the United States testifying directly to the alleged transaction was Captain Frank Loesewitz. He testified that he was a native, citizen, and resident of Antwerp, Belgium; by occupation a seafaring man, and captain of the steamer Rhynland, plying between Philadelphia and Liverpool. On the 27th day of January, 1896, witness made a social call at the residence and place of business of Mr. Van Hammelrick, in Antwerp, Belgium, Mr. Van Hammelrick being a friend of twenty-five years' standing, and the owner of a jewelry store. Just as witness was leaving, Mr. Van Hammelrick came with a person whom the witness identified in court as Mr. Herman Keck, the plaintiff in error, and Mr. Van Hammelrick invited witness to go and have a glass of beer. The strange person was introduced, but his name was not given. The three went to the Café Alsacienne, on the Place Verte, sat down at a table, and each ordered a glass of beer. The place was crowded, and there were thirty or forty people about. Mr. Van Hammelrick spoke in Flemish. While they were sitting there, Mr. Van Ham-

melrick took a small package from his pocket, showed it to witness, and said: "This package belongs to that person here," and Van Hammelrick further said to witness: "Will you oblige me, and take that over to America? It belongs to him; it belongs to that gentleman; he's a customer of mine; it does not contain any valuables." Witness asked the stranger, "Where shall I send it to?" The stranger tore a piece of paper off a card lying on the table, and put an address on it. The name on it was T. Van Reeth, Fourth Street, Cincinnati — either No. 21 or 24, and witness thought 21. Witness put the package and paper in his pocket, and after being at the café a quarter of an hour, the three separated on Place Verte, where Mr. Keck told witness to send the package by Adams Express. When witness went aboard his ship he put the package in a drawer in his state-room. Witness sailed January 29, 1896.

When the Rhynland reached the port of Philadelphia the following took place, as testified to by the witness Captain Frank Loesewitz (record, p. 27), to wit:

Q. "What took place when you reached the port of Philadelphia?"

A. "When I reached the port of Philadelphia, after the passengers were landed, two gentlemen entered my room, and they said they had information from Antwerp, that I had a package to a friend to send it to Cincinnati. I said right away, yes. I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were Treasury agents, and said, 'Captain, that is a package of diamonds you have got to be sent to Cincinnati, and if I did not deliver it I would be arrested.' After a while, I went down in my room and brought the package up, and delivered it over to the Treasury agents. That is all that happened."

The witness further testified (record, pp. 36–37), that he had been in the habit of bringing over small packages in the same way he had brought this package, and that after the vessel had been docked he would go to a custom officer on

the dock and report the fact. In this case he had not had time to go on the dock, as the Treasury agents came aboard before he had time to go upon the dock.

Treasury agent John C. Gallen testified (record, pp. 43–45), as follows:

Q. "When did the Custom House Inspectors get on board the Rhynland?

A. "The weather was very rough that day and the boarding officer boarded just as she was coming into the dock. I then asked one of the Custom Inspectors to examine closely the baggage of one or two of the cabin passengers whom I suspected, to ascertain whether they had any large quantity of jewelry, after which I went into the chart-room, where the Captain was with Special Agent Cummings. I spoke of the weather and other topics, and then I said: 'Captain'—to whom I was unknown—'you have a package for the Coeterman's Diamond Company—Coeterman-Keck Diamond Company, 24 West Fourth Street, Cincinnati, Ohio?' I repeated the name of the company. He said: 'No; I have no such package.' I said: 'I beg leave to differ with you,' and indicating with my fingers, I said: 'You have a small package which you received while in Antwerp.' He said: 'I have a package for Van Reeth, of 21 West Fourth Street, Cincinnati, Ohio, and I will give it to you if you have an order for it.'"

Q. "At that time, I understand you to say, he did not know you were a treasury agent?"

A. "No, sir; I was unknown."

Q. "Had you ever met him before?"

A. "Never met him before to know him. I then said: 'Captain, I have an order for them.' He said: '*Show me the order, and I will go and get the package.*' I replied: 'Captain, I would like to see the package first *before delivering the order*, and I want to speak to you in private.'"

Q. "Was there anything on your clothes like a badge, or anything else to show what you were?"

A. "No, sir; none whatever. He was doing some writing at the time—I think finishing the log—and he asked me to wait until he finished, and I said, 'Certainly.' After the lapse of about five minutes the Captain arose and said: 'You remain here, and I can go and get the package.' As soon as the Captain left the chart-room, I, quietly and unperceived by him, followed him and saw him enter his room, and just as he emerged he had a package in his hand. As soon as I saw it, I said: 'Captain, that is the package I want.' He said: '*Where is your order?*' *I produced my card as United States Treasury Agent. He refused to let me have it until I*

was identified as a Custom-House Officer. A young man present at the conversation opposite the Captain's room, who represented the Steamship Company; we agreed to go back to the chart-room, where I again insisted on getting this package, and this young man, who represented the Steamship Company, who was present, *advised the Captain to give the package to me, which the Captain did.* I then searched thoroughly the Captain's room, and also other parts of the vessel, but did not find any other dutiable stuff, after which I went into the chart-room again, and opened the package in the presence of the Captain—broke the seal and opened the package."

* * * * * * * * * *

Q. "You asked him for the diamonds, and you took them?"

A. "Yes, sir."

Q. "Did you tell him why?"

A. "No, sir."

Q. "*Did you tell him by what authority?*"

A. "*Yes, sir; I told him I was United States Treasury Agent, and this package containing diamonds was not on the manifest.*"

Special Treasury Agent James C. Cummings testified (record, p. 59), as follows:

Q. "Tell us in your own way what occurred?"

A. "I think it was about the time that the Captain said to Mr. Gallen that he had a package for Van Reeth that I came into the Captain's chart-room."

Q. "You were not in when Gallen started the conversation?"

A. "No, sir; I came in as the Captain said he had a package for Van Reeth, Cincinnati."

Q. "Did you hear whether he was asked that question before he answered it?"

A. "That I do not know.

Q. "You just heard him say that as you entered?"

A. "Yes, sir; he then asked Mr. Gallen if he had an order for the package and Mr. Gallen said that he had, and the Captain said: '*Give me the order and I will give you the package.*' Then Gallen said: 'Give me the package and I will show you the order.' After the Captain had finished writing off his log book, the Captain said he would go down and get it. He started down and Mr. Gallen followed him down to the room, and I went down also, and the Captain produced the package down in his room."

Q. "Where did he have it?"

A. "In his room."

Q. "He produced it?"

A. "Yes, sir."

Mr. Herman Keck, plaintiff in error, never was on board the Rhynland, and his testimony is a direct and categorical denial of the statements made by Captain Frank Loesewitz, as to all matters directly affecting Mr. Keck.

(*b.*) *The rulings of the Court.*

Mr. Herman Keck, plaintiff in error, requested the Court to give to the jury the following binding instruction (record, p. 110), to wit:

"The jury are instructed that there is insufficient evidence introduced into this case to make out the charges against the defendant, Herman Keck, and they are therefore instructed to return a verdict of not guilty on both bills of indictment."

This was refused by the Court, and an exception taken (record, p. 112), and was assigned as number ten in the assignments of error (record, p. 116).

Mr. Herman Keck, plaintiff in error, requested the Court to give to the jury the following binding instruction (record, p. 110), to wit:

"The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the second count of each Bill of Indictment, and they are therefore instructed to return a verdict of not guilty as to the second count of both Bills of Indictment."

This was refused by the Court, and an exception taken (record, p. 112), and was assigned as number twelve in the assignments of error (record, p. 116), and in the petition for a writ of error (record, p. 119).

The Court, in its charge, said to the jury (record, p. 112):

"*Gentlemen of the Jury*—The several statutory provisions under which the defendant is indicted have been read to you, and are doubtless understood. I need not undertake to explain them or to dwell upon the law governing the case. *It is sufficient to say in this respect, that if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged.*"

To the following part of the foregoing language an exception was noted (record, p. 113), to wit:

"It is sufficient to say in this respect that *if the statements made here under oath by Captain Loesewitz* respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

This constitutes assignment of error number seventeen (record, p. 118).

Assignment number sixteen in the assignments of error (record, p. 117–118), refers to the answer of the Court to the request for special instruction number ten. The Court said (record, p. 112), to wit:

"The Court affirms the tenth point generally, but the meaning ascribed to it by the Court is that the jury shall be fully convinced, from a careful examination of all the testimony heard, that the defendant is guilty of the *smuggling* charged, *as testified to by Captain Loesewitz;* and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilty generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal, and should be acquitted."

An exception was taken to this answer of the Court (record, p. 112), and the ruling of the Court was assigned as number sixteen in the assignments of error (record, pp. 117–118).

Assignment number thirteen in the assignments of error (record, p. 117), will be more specifically noted hereafter.

(*c.*) *Rules governing application of criminal statutes to facts.*

We are interpreting a criminal statute, and there are no constructive crimes. 1 Blackstone, 88. This court, in an unbroken line of decisions from 1820 to 1898, has repeatedly and consistently refused to make crimes by construction or implication. In *United States vs. Wiltberger* (1820), 5 Wheaton, 76, the defendant was indicted for manslaughter in violation of Section 12 of the Act of April 30, 1790 (1 Stat. 112, 115). Section 12 punished manslaughter committed on

the high seas. Wiltberger was charged with killing Benjamin Rush "in the river Tigris, in the empire of China, off Wampoa, and about 100 yards from shore, in four and a half fathoms of water, and below the low-water mark, thirty-five miles above the mouth of the river." The eighth section of the act punished murder on the high seas, river, haven, basin, or bay. In holding that no crime had been committed in violation of the statute, *Mr. Chief Justice Marshall* said (p. 95):

"The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment."

And again (p. 95–96):

"The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction."

And again (p. 96):

"To determine that a case is within the intention of a statute its language must authorize us to say so. *It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because it is of equal atrocity or of kindred character with those which are enumerated.* If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation which it would be unsafe to consider as precedents forming a general rule for other cases."

And again (p. 105):

"From this review of the examination made of the act at the bar, it appears that *the argument chiefly relied on to prove that the words of one section descriptive of the place, ought to be incorporated into another, is the extreme improbability that Congress could have intended to make those differences with respect to place which their words import. We admit that it is extremely*

improbable. But probability is not a guide which a court in construing a penal statute can safely take. We can conceive no reason why other crimes, which are not comprehended in this act, should not be punished. *But Congress has not made them punishable, and this Court can not enlarge the statute.*"

In *United States vs. Chase* (1890), 135 U. S., 255, the defendant was indicted for mailing an obscene letter in violation of the act of July 12, 1876 (19 Stat., 90). In holding the indictment insufficient *Mr. Justice Lamar* said (p. 261):

"Another argument on which indictments of this character have been sustained by some of the Circuit Courts is, that a reasonable construction must be given the statute, and it being evident that Congress intended to exclude anything of an obscene character from the mails, it is immaterial whether the thing prohibited is inside or outside of an envelope, and therefore unreasonable to hold that Congress intended not to allow a decent writing in an obscene envelope, but at the same time to allow obscene writing in a proper envelope. We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. *But this Court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress.*"

In *Sarlls vs. United States* (1894), 152 U. S., 570, defendant was charged with introducing beer into the Indian Territory in violation of Section 2139, Revised Statutes, forbidding the introduction of ardent spirits, spirituous liquors and wines into the Indian Territory. The conviction was set aside (p. 575) because the statute being penal the words of the statute could not be construed to cover beer by implication.

In *Swearington vs. United States* (1896), 161 U. S., 446, the defendant was indicted for mailing a newspaper containing very violent, coarse, and vulgar language as a violation of Section 3893, Revised Statutes. In setting aside a conviction *Mr. Justice Shiras* said (p. 451):

"The words 'obscene,' 'lewd,' and 'lascivious' as used in the statute signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. *As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.*

"Referring to this newspaper article, as found in the record, it is undeniable that its language is exceedingly coarse and vulgar, and as applied to an individual person, plainly libelous. But we can not perceive in it anything of a lewd, lascivious, and obscene tendency calculated to corrupt and debauch the minds and morals of those into whose hands it might fall."

In *France vs. United States* (1897), 164 U. S., 676, the defendants were indicted for conspiracy to violate the act of March 2, 1895 (28 Stat., 963). The statute prohibited inter-state commerce in any paper, certificate or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery or an advertisement of a lottery. The defendants carried "official prints" and "hit-slips" of the drawings. In setting aside the convictions *Mr. Justice Peckham* said (pp. 682–683):

"The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, *we can not sustain a conviction on that ground.* Although the objection is a narrow one, *yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly.* * * * *If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation.*"

Calderon vs. Atlas Steamship Company (1898), 170 U. S., 272, involved the interpretation of a bill of lading. *Mr. Justice Brown* said, among other things (pp. 280–281), that:

"*In construing contracts words are to receive their plain and literal meaning, even though the intention of the party drawing the contract may have been different from that expressed.* It was said of penal statutes by *Mr. Chief Justice Marshall* in *United States vs. Wiltberger*, 5 Wheat, 76, 95, that: 'The

intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so.'"

The case of *United States vs. Goldenberg* (1897), 168 U. S., 95, decided a year before the foregoing case, stated the same doctrine. The time within which duties should be paid after protest was under discussion. It was urged that the words of the statute should not be literally interpreted. In holding they should be *Mr. Justice Brewer* said (pp. 102–103) that:

"The primary and general rule of statutory construction is that the *intent* of the law-maker *is to be found in the language* that he has used. *He is presumed to know the meaning of words* and rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. * * * *No mere omission, no mere failure to provide for contingencies which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.* * * * Certainly there is nothing which imperatively requires the court to supply an omission in the statute, *or to hold that Congress must have intended to do that which it has failed to do.*"

(*d.*) *The facts do not make out a case of smuggling.*

Congress has enacted numerous statutes and sections thereof, touching matters pertaining to the revenue, each reaching a specific act or omission. Whatever statute, if any, the acts testified to violate, they do not fall within Rev. Stat., Sec. 2865, under which the second count of the indictment is drawn. The regular course in shipping merchandise to America is as follows: The invoice is taken to the American Consul at the place where the merchandise is purchased, and is duly certified to by the Consul. Act of June 10, 1890 (26 Stat., 131). An omission to get a consular invoice is not smuggling. The next step is to put the goods on board the ship. That does not constitute smuggling. The next step

is for the Captain of the vessel to put the goods on his manifest. Rev. Stat., Sec. 2806. An omission so to do is not smuggling, but is a distinct offense of omitting goods from the manifest. Rev. Stat., Sec. 2809. The next step is to steam or sail the vessel from the port of departure into the high seas. That is not smuggling. The next step is to steam or sail the vessel into port. *It is not until after the vessel comes within the port that an obligation arises to pay duty. United States vs. Vowell* (1809), 5 Cranch., 368; *Arnold vs. United States* (1815), 9 Cranch., 104, 120; *Hartranft vs. Oliver* (1888), 125 U. S., 523, 528; *Sherman vs. Robertson* (1889), 136 U. S., 570; *Seeberger vs. Schweyer* (1894), 153 U. S., 609; Carr on Judicial Interpretation of the Tariff Acts, Sec. 97, pp. 44–45. The goods on board the ship in port are, within the meaning of the law, in the custody of the Custom-house officer. *Mr. Justice Field*, in *Hartranft vs. Oliver* (1888), 125 U. S., 525, 528. Therefore, bringing the ship into port, is not smuggling. If the importing were wrongful, it constituted the crime of importing contrary to law. Rev. Stat., Sec. 3082. The next step is to produce the manifest. Rev. Stat., Secs. 2811, 2812. An omission to produce the manifest is not smuggling, but a distinct offense under Rev. Stat., Sec. 2814. The goods cannot be removed without the consent of the Custom-house Inspector. *Mr. Justice Field*, in *Hartranft vs. Oliver* (1888), 125 U. S., 525, 528. To take the dutiable goods on shore without paying the duty is smuggling. 1 Hawkins' Pleas of the Crown (7th London Ed.), 487; *ante*, pp. 9–10; 1 Russell on Crimes (London Ed., 1819), p. 16; *ante*, p. 10; 1 Gabbet's Criminal Law (London Ed., 1835), 48; *ante*, pp. 10–11; and 6 Bacon's Abridgement (5th London Ed.), 258; *ante*, p. 11; made a misdemeanor by Section 19 of the Act of August 30, 1842 (5 Stat., 548), now Sec. 2865, Rev. Stat.

The diamonds were never taken from the ship, and were never taken on shore. Captain Loesewitz, John C. Gallen,

and James C. Cummings all testified that the diamonds were not taken from the ship, and were not taken on shore, and that they were seized on board the ship Rhynland by Treasury Agent John C. Gallen (*ante*, pp. 16–20).

It was well said in 6 Bacon's Abridgement (5th Ed.), 286, that:

"As the offense of *smuggling is not complete* unless some goods, wares, or merchandise *are actually brought on shore*, or carried from shore contrary to law, a person may be guilty of divers practices which have a direct tendency thereto, *without being guilty of the offense.*"

And the same is found in volume 7, page 354, of the seventh London Edition of 1832, and in vol. 9, page 140, of the American Edition of 1876 by John Bouvier, the only three editions which have come into our hands.

(*e.*) *Assignments of error.*

It, therefore, follows that assignment of error number ten (*ante* p. 20) is well taken, because the Court refused to instruct the jury to find the defendant not guilty on the bill of indictment. The third count of the bill of indictment had been disposed of when the Court gave instruction number seven to find the defendant not guilty thereon (record, p. 111), and the first count is clearly bad, as has been heretofore presented in our former briefs. (Original Brief, pp. 22–25; Revised Brief, pp. 23–26; *Brief in Reply, pp. 1–12.*)

It also follows that assignment number twelve (*ante* p. 20) is well taken, because the Court refused to instruct the jury to find the defendant not guilty on the second count of the bill of indictment, which is the count charging the defendant with smuggling.

It also follows that assignment of error number seventeen (*ante* pp. 20–21) is well taken, because the Court instructed the jury to find the defendant guilty if they believed "*the state-*

ments made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here."

It also follows that assignment of error number sixteen (*ante*, p. 21) is well taken, because the Court, in response to a request for a special instruction, told the jury that they must find the defendant guilty if they find the defendant guilty "*of the smuggling charged as testified to by Captain Loesewitz.*"

III.

The Definition in the Anti-Moiety Act Does Not Apply.

(1.) What Congress means is to be determined by what Congress *says*. Sec. 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), defines smuggling "for the purposes of this act." Congress having thus given a definition of smuggling "for the purposes of this act," that definition can not be extended by implication or construction to another act. The same word used in several acts of Congress may have a different meaning in each act. Where Congress has defined a word "for the purposes of this act," courts are not at liberty to strike out these words or add the interpreting clause to another statute. The words are sensible, and have a decided influence on the meaning of the act in which they are used, and to strike them out, or to ignore the words, "for the purposes of this act," and arbitrarily add this special interpreting clause of one act to another act is making very free with legislative language, and amounts to judicial legislation.—*Post pp. 29-37.*

(2.) The definition of the word smuggle, "for the purposes of this act," contained in the proviso to Sec. 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), can not be given the word smuggle in Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. (2d Ed.).—*Post pp. 29-37.*

(*a.*) *The Anti-moiety Act—interpreting clause therein.*

It was contended on the two former oral arguments of this case by the learned Assistant Attorneys General and District Attorney and in two of the briefs submitted by them, that the definition of the word "smuggle" contained in Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), is to be given the word "smuggle" contained in Sec. 19, Act of Aug. 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. (2d Ed.). The definition of the word "smuggle," as contained in the Anti-moiety Act, is by the terms of that act *expressly confined to that act*, in the following language, to-wit:

"SEC. 4. That whenever any officer of the customs, or other person, shall detect and seize goods, wares, or merchandise, in the act of being smuggled, or which have been smuggled, he shall be entitled to such compensation therefor as the Secretary of the Treasury shall award, not exceeding in amount one-half of the net proceeds, if any, resulting from such seizure, after deducting all duties, costs, and charges connected therewith.

"*Provided, That for the purposes of this act* smuggling shall be construed to mean *the act*, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States dutable articles without passing the same, or the package containing the same, through the custom-house, or submitting them to the officers of the revenue for examination," etc., etc.

(*b.*) *The interpretation, application, and effect of the interpreting clause.*

What Congress meant is to be determined *by what Congress has said* (*ante*, pp. 8–9, for authorities). Congress has distinctly said that smuggling should be construed to mean certain things "*for the purposes of this act.*" Congress did not merely say "smuggling shall be construed to mean," but "*that for the purposes of this act* smuggling shall be construed to mean." And the language is not "smuggling shall be construed to *include*," but "smuggling shall be construed to *mean*."

It is stated in Sutherland on Statutory Construction (1891), 441, as follows:

"The expression '*this act*' can not be taken to include another act *in pari materia*."

Black on Interpretation of Laws (1896), 195, lays down this rule:

"An interpretation given in a statute *is to be restricted to the purposes and effects of that statute*, and not made a general rule of law. * * * * * * A distinction has also been taken between interpretation clauses which are incorporated in, *and apply to only one particular act* of the legislature, and those which form a part of an entire code, revision, or compiled body of laws, and are intended to govern the whole."

In *King vs. Trustees* (1836), 5 Adolphus & Ellis, 563, *Patteson, J.* (at pp. 577–578), said:

"As to the question whether the certiorari be taken away, Stat. 4G., 4c., 95s., 87, is not applicable to this proceeding, which, as conceded, is under Stat. 3G., 4c., 126, and neither entirely nor partially under Stat. 4G., 4c., 95; and the clause as to the certiorari, in Sec. 87, of Stat. 4G., 4c., 95, is expressly confined to proceedings '*had or taken in pursuance of this act*.' Thus far the plain words of the legislature. But then, it is said, that this Eighty-seventh Section of Stat. 4G., 4c., 95, gives an appeal against things done 'in pursuance of this act, or the said recited act, or any local act' for turnpike roads, and that the certiorari must be taken away co-extensive with the grant of the right of appeal. If the legislature meant this, they have not said it. In the first place they speak merely of '*this act*;' in the next, of 'the said recited act' and 'any local act' also. *They must, therefore, mean different things in the two places.*"

In *Rex vs. Bond* (1818), 1 Barnewall & Alderson, 390, defendant was indicted for setting up a still without license, and fined £200. The following are the opinions of the judges in full setting aside the conviction (pp. 392–393):

"*Lord Ellenborough, C. J.* There is a very inconvenient practice prevailing, and most especially in revenue acts, of imposing penalties by reference, as is done in this case. It has crept in by degrees, but is, I am afraid, now become inveterate. It produces this great evil, that no one, whilst this mode is adopted, can know what forfeitures he is incurring for any particular offense. Here the 26 G. 3 c. 73 s. 13 refers to some former statute, imposing a penalty on persons

actually using a back or still. Now, on examination, we do find one which imposes a penalty of £20 on persons who set up or use a still. But we do not find any one which in terms imposes a penalty of £200. Can we, then, infer that any such act has an existence? As to the antiquity of the statute imposing the smaller penalty, we have nothing to do with that. The legislature may, if they please, act upon it; but *we must take the law as we find it, and cannot, without authority, elevate one penalty into another.*"

"*Bayley, J.* Concurred."

"*Abbott, J. It would be extremely wrong that a man should, by a long train of conclusions, be reasoned into a penalty, when the express words of the act of parliament do not authorize it.*"

"*Holroyd, J.* Concurred. *Conviction quashed.*"

In the matter of *The East India Interest* (1825), 3 Bingham, 193, in the House of Lords, *Lord Chief Justice Best* said (at p. 196) that:

"This is a penal statute, and must, according to the rules by which acts of parliament are construed, receive a strict interpretation. Our law will not allow of constructive offenses; no man incurs a penalty unless the act which subjects him to it is clearly within the spirit and letter of the statute imposing such penalty. The meaning of the words of an act of parliament is to be ascertained from the subject to which it refers, *so that the same words receive a very different construction in different statutes.*"

To make the definition of smuggling contained in section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), applicable to the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865 Rev. Stat. (2d ed.) *it is necessary to strike out seven words* from the Anti-moiety Act, to wit, the words "*that for the purposes of this act.*"

In *United States vs. Wiltberger* (1820), 5 Wheaton, 76 (*ante*, pp. 21–23), it was contended that the words "river, haven, basin or bay," contained in the eighth section could, be engrafted on section nine after the word "high seas," and, therefore, in section twelve after the word "high seas," the same being the obvious intention of the legislature. In denying this contention, *Mr. Chief Justice Marshall* (p. 95) said, "It is the

legislature, not the court, which is to define a crime, and ordain its punishment." It was next contended that had the words "on the high seas" been omitted in sections nine and twelve, reference might have been had to the words "high seas or in any river, haven, basin or bay" contained in the eighth section, and that, therefore, the court should strike out the words "on the high seas" in the ninth and twelfth sections, and thus carry out the obvious intention of Congress. But *Mr. Chief Justice Marshall* denied this contention as follows (pp. 99–100), to wit:

"It has been argued, and, we admit, with great force, that in this section (9th) the legislature intended to take from a citizen offending against the United States, under color of a commission from a foreign power, any pretense to protection from that commission; and it is almost impossible to believe that there could have been a deliberate intention to distinguish between the same offense, committed under color of such commission, on the high seas, and on the waters of a foreign State, or of the United States, out of the jurisdiction of any particular State. *This would unquestionably have been the operation of the section, had the words 'on the high seas,' been omitted. Yet it would be carrying construction very far to strike out those words. Their whole effect is to limit the operation which the sentence would have without them; and it is making very free with legislative language, to declare them totally useless, when they are sensible, and are calculated to have a decided influence on the meaning of the clause.*"

In *Bate Refrigerating Co. vs. Sulzberger* (1895), 157 U. S., 1, *Mr. Justice Harlan*, in interpreting the patent laws, used some expressions which well state some first principles of hermeneutics. At p. 31 he said:

"We do not see how any language could have been employed that would more clearly express the legislative design."

Again, at pp. 35–36:

"We cannot super-add, in Section 4887 of the Revised Statutes, the words 'prior to the application,' either after the words 'first patented or caused to be patented in a foreign

country,' or after the words 'previously patented in a foreign country,' without defeating the intention of Congress as manifested by the language it selected to indicate its purpose."

Again, at pp. 36–37:

"In our judgment, the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action."

So in the case at bar it would be carrying construction very far and making very free with legislative language to strike out the words "that for the purposes of this act." That no implication might be attempted to be indulged in, and as an express legislative interdiction against applying the definition to any other statute it is expressly provided that smuggling shall mean certain things "*for the purposes of this act.*" Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), does not provide for the punishment of smuggling, and Mr. Herman Keck, plaintiff in error, was not and could not be indicted for a violation thereof. The first half of section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), was inadvertently omitted from the Revised Statutes which were approved by the President June 22, 1874, and which took effect as of December 1, 1873 (*ante* pp. 6–8). The Anti-moiety Act was, by a mere coincidence, approved June 22, 1874 (18 Stat., 186). The accidental omission of many matters from the revision, including the first half of section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), led Congress, February 27, 1877 (19 Stat., 240, 247), to perfect the revision in, among other ways, the full restoration of section 19 of the Act of August, 1842 (*ante* p. 8). Congress ordered a new edition of the Revised Statutes, and section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), appears as section 2865 therein (*ante* p. 8). If Congress intended, on June 22, 1874, to make a statutory definition of smuggling for all purposes, it would have been

easy for Congress to have said so, but Congress did not. If, after the temporary and unintentional suspension of the first half of section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), from June 22, 1874, to February 27, 1877, it was not intended to have merely restored section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), it was easy for Congress to have said so. If Congress intended to make a change, it would have been easy at the same time in the same act, February 27, 1877, to have provided that the words, "that for the purposes of this act," be stricken from Section 4 of the Act of June 22, 1874 (18 Stat., 186), or to have provided that the word smuggle in the Act of February 27, 1877 (19 Stat., 240, 247), should have the same meaning as the word smuggle in the Act of June 22, 1874 (18 Stat,, 186). But Congress did not do so. (See authorities, *ante* pp. 8–9; pp. 21–25). On the contrary, the Act of February 27, 1877 (19 Stat., 240, 247), expressly stated that its purposes were to correct errors and supply omissions and *perfect* the revision (*ante* p. 8). The language of Sec. 2865, Rev. Stat. (2d Ed.), is identical with that of Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565). The Act of February 27, 1877 (19 Stat., 240, 247), amending Rev. Stat. (1st Ed.), Sec. 2865, restoring Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), is a criminal statute, and cannot, by implication, be construed to include a part of another statute passed some three years prior thereto, especially when such prior act contained an interpreting clause expressly limited to itself. (See authorities, *ante* pp. 21–25, 29–32).

(*c.*) *Dictum in the Claflin Case.*

The learned Assistant Attorney-General relies on a *dictum* of *Mr. District Judge Benedict* in *United States vs. Claflin* (1875), 13 Blatchford, 178. The question before the learned District Judge was as to the sufficiency of an indictment drawn under Section four (4) of the Act of July 18, 1866 (14 Stat., 178, 179),

after the revision, Sec. 3082, Rev. Stat., punishing "importing contrary to law." Therefore he did not have before him any question as to the meaning of the word "smuggle" contained in Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. (2d Ed.). At the date of the alleged crime, the indictment and the opinion of *Mr. District Judge Benedict* that part of Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), punishing smuggling had been inadvertently repealed when the President approved the Revised Statutes, June 22, 1874, (*ante* pp. 7–8). It was even claimed by the learned Assistant Attorney-General that Sec. 4 of the Act of July 18, 1866 (14 Stat., 179), afterwards Sec. 3082, repealed Sec. 19 of the Act of August 30, 1842 (5 Stat., 546, 565), by implication. But how this helps his argument is not clear, and in it he is also clearly in error. Section 4 of one act is directed against "*importing contrary to law*," while Section 19 is directed against "*smuggling and clandestinely introducing into the United States*." The Act of July 18, 1866 (14 Stat., 178), as its title indicated, may subserve the purpose of *preventing* smuggling by the enforcement of its forty-four sections, which cover eleven printed pages, while Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), provides for the *punishment* of a person who has actually committed smuggling. It is a well-settled rule that repeals by implication are not favored, and one statute does not impliedly repeal another, unless the two statutes cover the same subject matter, and are clearly, explicitly, and directly repugnant to each other, and can not be reconciled, and can not from their nature co-exist. *United States vs. Greathouse* (1897), 166 U. S., 601, 605; *United States vs. Healey* (1895), 160 U. S., 136, 147; *Frost vs. Wenie* (1895), 157 U. S., 46, 58; Black on Interpretation (1896), 112; Sutherland Stat. Con. (1891), 179–180; Wilberforce Statute Law (1881), 310; Hardcastle Const. of Stat. (2d Ed., 1892), 345–346; Maxwell on Interpretation (3d Eng. Ed., 1896), 214, 255. That Sec. 4 of the Act of July

18, 1866 (14 Stat., 178), now Sec. 3082, Rev. Stat., meant something different from Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), is clearly apparent from the fact that although when the latter half of said Section 19 was embodied as Sec. 2865, Rev. Stat., the first half was expressly, although inadvertently, repealed by Sec. 5596, Rev. Stat., yet Congress, Feb. 27, 1877, passed an act (19 Stat., 240, 247) restoring Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), and which became Sec. 2865, Rev. Stat. (2d Ed.) (*ante* pp. 6–8).

If it be said that the opinion of *Mr. District Judge Benedict* is a decision as to the meaning of the word smuggle, contained in Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Rev. Stat., Sec. 2865, what he says is necessarily a mere *dictum*. In *Cohens vs. Virginia*, (1821), 6 Wheaton, 264, *Mr. Chief Justice Marshall* well said (at pp. 399–400):

"The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the Court in the case of *Marbury vs. Madison*. It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. In the case of *Marbury vs. Madison*, the single question before the court, so far as this case can be applied to this, was whether the legislature could give this court original jurisdiction in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The Court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But in the reasoning of the Court in support of this decision, some expressions are used which go far beyond it."

Mr. Justice Gray, in *United States vs. Wong Kim Ark* (1898), 169 U. S., 649, 679, approved the above, and *Mr. Chief Justice*

Fuller, in his dissenting opinion, concurred in by *Mr. Justice Harlan* (p. 724), conceded its force.

It is also significant that in *Dunbar vs. United States* (1895), 156 U. S., 185, although *Mr. Justice Brewer* cites *United States vs. Claflin*, 13 Blatch., 178, in support of the manner of describing opium (p. 191), yet he does not use the definition in determining the validity of an indictment drawn under Sec. 2865, Rev. Stat., but cites (p. 193) Bouvier, vol. 2, p. 528, and Bouvier cites Bacon, and Bacon defines smuggling as heretofore set out (*ante* pp. 11–12). Nor is it to be forgotten that the opinion referred to is that of a single judge at *nisi prius*

IV.

Rulings of Court Assigned for Error as to Smuggling Defined in the Anti-moiety Act.

(1.) If, contrary to our contention, the Court adopt the definition contained in the Anti-moiety Act, then the following eight (8) elements must co-exist to constitute a violation of Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., to wit: (*a*) An *act* of getting goods into the United States without passing them through the custom-house; *or*, an *act* of getting goods into the United States without submitting them to the officers of the revenue for examination; (*b*) goods, wares or merchandise; (*c*) which should have been invoiced; (*d*) and as to which the invoice is omitted; (*e*) goods, etc., subject to duty; (*f*) the duty not being paid; (*g*) done knowingly and willfully, and (*h*) all with intent to defraud the revenue of the United States. No obligation arises to pay duty until after the vessel has come into port with intent to land. The *act*, therefore, necessarily refers to an *overt act* after an obligation has arisen to pay duty.— ***Post pp. 42-48.***

(2.) Obtaining diamonds in Europe with the intention of getting them into America without passing them through the custom-house, and without submitting them to an officer of the revenue for examination, placing them in a state-room on a steamship at Liverpool, omitting them from the steamship's manifest, steaming the ship into the high seas, steaming the ship into the port of Philadelphia with intent to land them, accompanied with an intention not to pass them through the custom-house and not to submit them to an officer of the revenue for examination, and a demand for the diamonds by a revenue officer who did not make himself known as such, a refusal to deliver them to the revenue officer without an order, a failure to produce an order, and only delivering them to the revenue officer after the revenue officer had made himself known and had been identified as such and then delivering them to him in his official capacity, does not constitute an *act* of getting the diamonds into the United States without passing them through the custom-house, or submitting them to an officer of the revenue for examination. A demand by a revenue officer, as such, for said diamonds and a delivery thereof to him, as such, do not constitute an *act* of getting diamonds into the United States without passing them through the custom-house or submitting them to an officer of the revenue for examination.—*Post pp. 48-51.*

(3.) The Act of June 1, 1872 (17 Stat., 196, 198), now Sec. 1035, Rev. Stat., only permits a verdict of guilty of an attempt when the attempt is itself a separate offense. The statutes of the United States have never made an attempt to smuggle a separate offense.—*Post, pp. 51-52.*

(4.) The interpreting clause contained in the proviso to Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), makes smuggling for the purposes of that act either

(*a*) an act of smuggling actually completed, or (*b*) an overt act of an attempt to smuggle. This gives the word smuggle an unnatural meaning not in accordance with the common understanding of the word and contrary to the rules of grammar. The interpreting clause furnishes a rule for the interpretation of this statute, but not for the interpretation of the indictment. It, therefore, follows that an indictment for smuggling is not an indictment for attempt to smuggle, and an attempt to smuggle not being made a separate offense, there could be no conviction for an attempt to smuggle under said indictment.—*Post, pp. 52-54.*

(5.) An attempt is an overt act of the same character as an act which would constitute a completed offense if not interrupted before its completion. An intent is not an overt act of attempt, and overt acts of preparation with intent do not constitute overt acts of attempt.—*Post, pp. 59-62.*

(6.) The facts set forth in paragraph (2), above, do not constitute more than overt acts of preparation with an intent, and do not constitute overt acts of an attempt to smuggle.—*Post, pp. 54-67.*

(*a.*) *The facts and the evidence.*

The evidence bearing on this question has already been set out (*ante* pp. 16–20), and will not be repeated.

(*b.*) *The rulings of the Court.*

Mr. Herman Keck, plaintiff in error, requested the Court to give to the jury the following binding instruction (record, p. 110), to wit:

"The jury are instructed that there is insufficient evidence introduced into this case to make out the charges against the defendant, Herman Keck, and they are therefore instructed to return a verdict of not guilty on both bills of indictment."

This was refused by the Court, and an exception taken (record, p. 112), and was assigned as number ten in the assignments of error (record, p. 116).

Mr. Herman Keck, plaintiff in error, requested the Court to give to the jury the following binding instruction (record, p. 110), to wit:

"The jury are instructed that there is insufficient evidence to make out a case against the defendant, Herman Keck, upon the second count of each Bill of Indictment, and they are therefore instructed to return a verdict of not guilty as to the second count of both Bills of Indictment."

This was refused by the Court, and an exception taken (record, p. 112), and was assigned as number twelve in the assignments of error (record, p. 116), and in the petition for a writ of error (record, p. 119).

The Court, in its charge, said to the jury (record, p. 112):

"*Gentlemen of the Jury*—The several statutory provisions under which the defendant is indicted have been read to you, and are doubtless understood. I need not undertake to explain them or to dwell upon the law governing the case. *It is sufficient to say in this respect, that if the statements made here under oath by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged.*"

To the following part of the foregoing language an exception was noted (record, p. 113), to wit:

"It is sufficient to say in this respect that *if the statements made here under oath by Captain Loesewitz* respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged."

This constitutes assignment of error number seventeen (record, p. 118).

Assignment number sixteen in the assignments of error (record, pp. 117–118), refers to the answer of the Court to the request for special instruction number ten. The Court said (record, p. 112), to wit:

"The Court affirms the tenth point generally, but the meaning ascribed to it by the Court is that the jury shall be fully convinced, from a careful examination of all the testimony heard, that the defendant is guilty of the *smuggling* charged, *as testified to by Captain Loesewitz;* and that if it is so convinced, beyond room for reasonable doubt, it will be justified in finding a verdict of guilty generally, and should do so. If it is not thus convinced, the defendant is entitled to an acquittal, and should be acquitted."

An exception was taken to this answer of the Court (record, p. 112), and the ruling of the Court was assigned as number sixteen in the assignments of error (record, pp. 117–118).

Mr. Herman Keck, plaintiff in error, requested the Court to give to the jury the following special instruction (record, pp. 110–111), to wit:

"No. 5. The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same, or putting the same on his manifest, and delivering same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen, said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling, or clandestinely introducing, or attempting to bring in, and as to the crime so charged, your verdict must be not guilty."

This was refused by the Court, and an exception taken (record, p. 112), and was assigned as number thirteen in the assignments of error (record, pp. 117–118) and in the petition for a writ of error (record, p. 119).

(*c.*) *Rules governing application of criminal statutes to facts.*

What we have heretofore said on this subject applies equally to the question under discussion, and without repeating it the Court is referred thereto (*ante*, pp. 21–25).

(*d.*) *The question divided for discussion.*

If the Court determine that the definition contained in the Anti-moiety Act applies, then the rulings of the Court are erroneous for the following reasons, to wit:

(1.) The facts do not make out a case of smuggling, as defined in the Anti-moiety Act.

(2.) The testimony of Captain Loesewitz does not make out a case of smuggling, as defined in the Anti-moiety Act.

(3.) There is no statute punishing an attempt to smuggle, as defined in the Anti-moiety Act.

(4.) The indictment does not charge an attempt to smuggle.

(5.) The facts do not make out a case of attempt to smuggle.

(6.) The testimony of Captain Loesewitz does not make out a case of attempt to smuggle.

(*e.*) (*1.*) *The facts do not make out a case of smuggling as defined in the Anti-moiety Act.*

Even if it were proper to give the word "smuggle" in the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., the definition contained in the proviso to Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), the evidence does not make out an offense, because there was *no act* of passing the diamonds into the United States without passing them through the custom-house, or passing them into the United States without submitting them to the officer of the revenue for examination. The Anti-moiety Act specifies that it is "*the act*" of getting goods past the custom-house without passing them through the custom-house; or "*the*

act" of getting the goods past the officer of the revenue without submitting them to him for examination. The evidence shows no such "*act*."

To give the Anti-moiety Act the construction contended for, it would be necessary to read it without the words, "*acts with*," and it would read "smuggling shall be construed to mean the intent to defraud," instead of "*the act* with intent to defraud," etc. To give it such an interpretation would violate all the rules of interpretation to which we have already referred. (See authorities, *ante*, pp. 8–9; pp. 21–25; pp. 29–34.)

In order to constitute the crime of smuggling under Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), Sec. 2865, Rev. Stat., the following elements must co-exist:

(1.) Smuggling and clandestinely introducing into the United States.

(2.) Goods, wares, or merchandise,

(3.) Which should have been invoiced,

(4.) And as to which the invoice is omitted,

(5.) Goods, etc., subject to duty,

(6.) The duty not being paid,

(7.) Done knowingly and willfully,

(8.) All with intent to defraud the revenue of the United States.

If we adopt the definition contained in the proviso to Section 4 of the Anti-moiety Act, the following elements must co-exist:

(1.) An *act* of getting goods into the United States without passing them through the custom-house:

Or,

An *act* of getting goods into the United States without submitting them to the officers of the revenue for examination.

(2.) Goods, wares, or merchandise,

(3.) Which should have been invoiced,

(4.) And as to which the invoice is omitted,

(5.) Goods, etc., subject to duty,

(6.) The duty not being paid,

(7.) Done knowingly and willfully,

(8.) All with intent to defraud the revenue of the United States.

The Act of Aug. 30, 1842 (5 Stat., 548, 565), thus interpreted, punishes either an *act* of getting goods into the United States without passing them through the custom-house *without paying the duty;* or an *act* of getting goods into the United States without submitting them to the officers of the revenue for examination *without paying the duty.* The *acts,* therefore, refer to overt acts committed after the obligation has arisen to pay the duty. This obligation *to pay the duty* does not arise until after the vessel arrives within the port of entry with intent to land; *United States vs. Vowell* (1809), 5 Cranch, 368; *Arnold vs. United States* (1815), 9 Cranch, 104, 120; *Hartranft vs. Oliver* (1888), 125 U. S., 525, 528; *Sherman vs. Robertson* (1889), 136 U. S., 570; *Saltonstall vs. Russell* (1894), 152 U. S. 628, 631; *Seeberger vs. Schweyer* (1894), 153 U. S., 609.

In *United States vs. Vowell* (1809), 5 Cranch, 368, *Mr. Chief Justice Marshall* said (p. 372) that:

"The distinction taken by the counsel for the defendants in error, between a district and a port of entry, is correct. *The duties did not accrue, in the fiscal sense of the term, until the vessel arrived at the port of entry.* If the question had been doubtful, the Court would have respected the uniform construction which it is understood has been given by the Treasury Department of the United States upon similar questions. It is understood, that in case of an increase of duty, the United States have always demanded and received the additional duty if the goods have not arrived at the port of entry before the time fixed for the commencement of such additional duty, although the vessel may have arrived within the collection district before that time. The same rule of construction is to be observed when there is a diminution of duty."

In *Arnold vs. United States* (1815), 9 Cranch, 104, *Mr. Justice Storey* said (p. 120):

"It is further contended that the importation was complete by the arrival of the vessel within the jurisdiction limits of the United States on the 30th day of June. We have no difficulty in overruling this argument. To constitute an importation *so as to attach the right to duties*, it is necessary not only that there should be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry. This was expressly decided in the case of the *United States vs. Vowell*, 5 Cranch, 368."

In *Hartranft vs. Oliver* (1888), 125 U. S., 525, *Mr. Justice Field* said (p. 528):

"Ordinarily, goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse; and thus the designation of the goods as thus placed is, in the legislation of Congress, in effect a designation, and no more, of their being in such custody. But goods on board of a ship, in charge of a custom-house officer, preliminary to their removal to a public store or a bonded warehouse, and during the time necessary for that purpose, are in like custody, and so are, within the spirit and intent of the law, subject only to such duties as are leviable when the goods are freed from such custody. So far as the Government is concerned, they are in the same position as if technically in a public store or bonded warehouse. When in either of those places, they cannot be removed without a permit from the collector. When on ship board in charge of a custom-house inspector, they are in the same condition, and cannot be removed without a like permit. By statute, collectors are required to put one or more inspectors on board of every vessel immediately on her coming within a collection district; and no merchandise can be unloaded or removed from the vessel without a permit in writing from the collector. Rev. Stat., Sections 2875, 2876."

The same rule was laid down in *Sherman vs. Robertson* (1889), 136 U. S., 570, 571; *Saltonstall vs. Russell* (1894), 152 U. S., 628, 631; *Seeberger vs. Schweyer* (1894), 153 U. S., 609, 611, 613; and many other cases.

Carr in his commentary on "Judicial Interpretation of the Tariff Acts" (1894), 44-45, states the rule thus:

"SEC. 97. To constitute an importation so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry."

Following out the regular course in shipping merchandise to America, the following may be noted: The invoice is taken to the American Consul at the place where the merchandise is purchased, and is duly certified to by the Consul. Act of June 10, 1890 (26 Stat., 131). An omission to get a consular invoice is not an *act* of bringing merchandise into the United States without passing the same through the custom-house or submitting them to the officers of the revenue for examination *without paying the duty*. The next step is to put the goods on board the ship. That is not an *act* of bringing merchandise into the United States without passing the same through the custom-house or submitting them to the officers of the revenue for examination *without paying the duty*. The next step is for the captain of the vessel to put the goods on the manifest. Rev. Stat., Sec. 2806. An omission so to do is not an *act* of bringing merchandise into the United States without passing the same through the custom-house or submitting them to the officers of the revenue for examination *without paying the duty*, but is a distinct offense of omitting goods from the manifest. Rev. Stat., Sec. 2809. The next step is to steam or sail the vessel from the port of departure into the high seas. That is not an *act* of bringing merchandise into the United States without passing the same through the custom-house or submitting them to the officers of the revenue for examination *without paying the duty*. The next step is to steam or sail the vessel into port. *It is not until after the vessel comes within the port that an obligation arises to pay duty. United States vs. Vowell* (1809), 5 Cranch., 368; *Arnold vs. United States* (1815), 9 Cranch., 104, 120; *Hartranft vs. Oliver* (1888), 125 U. S., 523, 528; *Sherman vs. Robertson* (1889), 136 U. S., 570; *Saltonstall vs. Russell*

(1894), 152 U. S., 628, 631; *Seeberger vs. Schweyer* (1894), 153 U. S., 609; Carr on Judicial Interpretation of the Tariff Act, Sec. 97, pp. 44–45. The goods on board the ship in port are, within the meaning of the law, in the custody of the custom-house officer. *Mr. Justice Field*, in *Hartranft vs. Oliver* (1888), 125 U. S., 525, 528. A port is an entity. Therefore, bringing the ship into port is not an *act* of bringing merchandise into the United States without passing the same through the custom-house or submitting them to the officers of the revenue for examination *without* paying the duty. Bringing into port must necessarily *precede* the *act* of passing the goods through the custom-house, and *precede* the *act* of submitting goods to the officers of the revenue for examination. If the importation were wrongful, it constitutes the crime of importing and bringing in contrary to law. Rev. Stat., Sec. 3082. The next step is to produce the manifest. Rev. Stat., Secs. 2811 and 2812. An omission to produce the manifest is not an *act* of bringing merchandise into the United States without passing the same through the custom-house or submitting them to the officers of the revenue for examination *without paying the duty*, but a distinct offense under Rev. Stat., Sec. 2814. The goods cannot be removed without the consent of the Custom-house Inspector. *Mr. Justice Field*, in *Hartranft vs. Oli-* (1888), 125 U. S., 525, 528. It is now that a person might take the goods from the vessel into the United States by passing them through the custom-house or submitting them to the officers of the revenue for examination, and an *act* of taking the goods into the United States *without* passing the same through the custom-house or submitting them to the officers of the revenue for examination without paying the duty would constitute smuggling within the meaning of the proviso of Section 4 of the Anti-moiety Act of June 22, 1874, as a violation of Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., if this Court hold that that definition applies, contrary to our contention (*ante*, pp. 28–39).

Upon the arrival of the steamer Rhynland within the port of entry of Philadelphia, the vessel and its cargo were in the custody of the custom-house officials. Nothing was done. There was no overt act after the constructive possession of the cargo by the custom-house officials, after the importation was complete, *after the obligation to pay duties accrued*, the diamonds having been seized by Revenue Officer Gallen before any overt acts were thereafter committed. And this is true, whether we take the story as detailed by Captain Frank Loesewitz (record, p. 27; *ante*, pp. 17–18), or that of Revenue Officer Gallen (record, pp. 43–45; *ante*, pp. 18–19), or of Special Treasury Agent Cumings (record, p. 59; *ante*, p. 19), for in either case Captain Loesewitz delivered the diamonds on board the steamer Rhynland to Revenue Officer Gallen, whom he knew to be such at the time of the delivery.

According to the testimony of Treasury Agent John C. Gallen (record, pp. 43–45; *ante*, pp. 18–19) there was no *act* of bringing the diamonds from aboard the ship Rhynland into the United States without passing the diamonds through the custom house, and there was no *act* of bringing the diamonds from aboard the ship Rhynland into the United States without submitting the same to the officers of the revenue for examination. According to Mr. Gallen's evidence (*ante*, p. 18), Gallen on board the ship asked Captain Loesewitz if he had a package for certain named persons, and he said he had a package for Van Reeth, and said he would give up the package to Gallen if he had an order for it. Gallen said that he did have an order. Captain Loesewitz said, "show me the order and I will go and get the package." Gallen replied, "I would like to *see* the package *before delivering the order*." Gallen followed the Captain down to his room, which the Captain entered, and emerged with the package in his hand. Loesewitz said, "*Where is your order?*" Gallen testified, "I produced my card as United States Treasury Agent. He refused to let me have it until I was identified as a custom-

house officer." A young man then identified Gallen as a custom-house officer, and Gallen testified that the young man "*advised the Captain to give the package to me, which the Captain did.*" Gallen was asked if he told Captain Loesewitz by what authority he took the diamonds, and replied: "*Yes, sir; I told him I was United States Treasury Agent and this package containing diamonds was not on the manifest.*"

It is, therefore, very apparent from the evidence that the production of an order, signed by the consignee, was a *condition precedent* to the delivery of the diamonds to Gallen. Gallen, as an impersonated agent, never did obtain the diamonds in that character to take them from ship-board into the United States. He never did produce either a genuine or fictitious order, which was the *condition precedent* to the delivery of the diamonds to Gallen as a *carrier* to take the diamonds from ship-board into the United States. Not producing an order, either genuine or fictitious, Captain Loesewitz declined to give up the package. Gallen then produced his card as a United States Treasury Agent, and Loesewitz consented to deliver up the package if Gallen identified himself as such. A young man connected with the steamship company thereupon identified Gallen, and Loesewitz gave up the package. Gallen testified that he told Loesewitz that he took the package by virtue of his office as United States Treasury Agent, because the package was not on the manifest. It follows, therefore, that there was no *act* of bringing the diamonds from aboard ship into the United States without passing the same through the custom-house; and without passing the duty; that there was no *act* of bringing the diamonds from aboard ship into the United States without submitting the same to the officers of the revenue for examination without paying the duty; on the contrary, they were submitted to Gallen when he made the fact known that he was an officer of the revenue.

Special Treasury Agent James C. Cummings testified more

briefly *to a part of the conversation* between Gallen and Loesewitz, substantially as testified to by Gallen (*ante*, p. 19).

Captain Loesewitz testified that they came to his chart-room, and they said they were treasury agents, and wanted the package, and he gave it up to them (*ante*, pp. 17–18). He further testified that he had been in the habit of bringing over small packages in the same way he had brought this package, and that after the vessel had been docked he would go to a customs' officer on the dock and report the fact, and that in this case he had not had time to go on the dock, as the treasury agents came aboard before he had time to go upon the dock (record pp. 36–37; *ante*, pp. 17–18).

As there was no act within the meaning of smuggling as therein given it, it therefore follows that assignment of error number ten (*ante*, pp. 39–40) is well taken, because the Court refused to instruct the jury to find the defendant not guilty on the bill of indictment. The third count of the bill of indictment had been disposed of when the Court gave instruction number seven to find the defendant not guilty thereon (record, p. 111), and the first count is clearly bad, as has been heretofore presented in our former briefs (Original Brief, pp. 22–25; Revised Brief, pp. 23–26. *Brief in Reply, pp. 1–12*).

It also follows that assignment number twelve (*ante*, p. 40) is well taken, because the Court refused to instruct the jury to find the defendant not guilty on the second count of the bill of indictment, which is the count charging the defendant with smuggling.

(*e.*) (*2.*) *The testimony of Captain Loesewitz does not make out a case of smuggling as defined in the Anti-moiety Act.*

This proposition was necessarily involved in the discussion of the preceding proposition (*ante*, pp. 42–50), and it will not be repeated. In addition we add that according to the testimony of Captain Loesewitz, he did the very thing which the law requires — namely, "submitted them to the officers of the revenue for examination." (*Ante*, p. 49.)

It, therefore, follows that assignment of error number seventeen (*ante*, p. 40) is well taken, because the Court instructed the jury to find the defendant guilty if they believed "*the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here.*"

It also follows that assignment of error number sixteen (*ante*, pp. 40–41) is well taken, because the Court, in response to a request for a special instruction, told the jury that they must find the defendant guilty if they found the defendant guilty "*of the smuggling charged as testified to by Captain Loesewitz.*

(*e.*) (3.) *There is no statute punishing an attempt to smuggle as defined in the Anti-moiety Act.*

The Act of June 1, 1872 (17 Stat., 196, 198), provided, among other things, as follows, to wit:

"SEC. 9. That in all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, *or may be found guilty of an attempt* to commit the offense so charged; *provided, that such attempt be itself a separate offense.*"

This was incorporated as Sec. 1035, Rev. Stat. It will be noted that by this act that a person "*may be found guilty of an attempt * * * provided, that such attempt be itself a separate offense.*"

Nowhere in the statutes of the United States is an attempt made a separate offense. This is a criminal statute and cannot be extended by construction. (See authorities, *ante*, pp. 21–25.) The plain language of a statute must be followed (see authorities, *ante*, pp. 8–9). The Anti-moiety Act does not undertake to punish smuggling and this indictment is not drawn thereunder, but is based on Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat.

As to some crimes, attempts are made substantive offenses, such as attempts to commit the crime of murder or manslaughter, as under Section 5342 of the Rev. Stat. In some States general statutes have been passed, permitting a conviction for an attempt under an indictment for doing the act. But there are no Federal statutes of that kind, and none in reference to the crime of smuggling. The only place the word attempt is used in reference to smuggling is in the interpreting clause in proviso to Section 4 of the Anti-moiety Act. (See *ante* pp. 28–37.) It is nowhere made a "separate offense."

(*e.*) (*4.*) *The indictment does not charge an attempt to smuggle.*

If it be held, contrary to our contention (*ante*, pp. 28–37) that the definition in the Anti-moiety Act applies, the indictment does not charge an attempt to smuggle. As we have already stated, the proviso in Sec. 4 of the Anti-moiety Act, is an interpreting clause (*ante*, pp. 29–30).

The following is laid down in Sutherland on Stat. Con. (1891), 307:

"It was enacted that in construing statutes the words 'spirituous liquors' should be taken to include intoxicating liquors, and all mixed liquors, any part of which is spirituous or intoxicating. Under an indictment charging the selling of spirituous liquors, it was held error to admit proof of selling any liquor which was not such in fact, independently of the statutory definition; *that the statute furnished a guide for the construction of the statute, not the indictment.*"

Black on Interpretation of Laws (1896), 195, lays the rule down as follows, to wit:

"A legislative definition in a statute does not govern in an indictment. The construction of the statutes is governed by legislative definitions, that of indictments is governed entirely by the ordinary use of language."

In *State vs. Adams* (1872), 51 N. H., 568, defendants were indicted for being "common sellers of spirituous liquors."

The State offered evidence that defendants were "common sellers of ale, porter, and cider; and that these liquors contained from four to ten per cent of alcohol, which could be separated from them merely by distillation;" to this evidence the defendant excepted, and the case was reserved. The general statutes of New Hampshire provided that the words "spirituous liquor" should be taken to include intoxicating liquor, and all mixed liquor, any part of which is spirituous or intoxicating. The defendants did not contend that ale, porter, and cider are not intoxicating liquors, or that the sale of those liquors is not prohibited by statute, but that the indictment did not charge them with selling that description of liquors, and hence that no evidence of sales of ale, porter, and cider is admissible under this indictment.

Mr. Justice Smith said (pp. 569–570) that:

"This objection is well taken. The indictment charges sales of spirituous liquors only. * * * The legislature have enacted that, in construing statutes, the words 'spirituous liquor' shall be taken to include intoxicating liquor, and all mixed liquor, any part of which is spirituous or intoxicating. * * But this rule for the construction of statutes cannot govern in construing this indictment."

It is repugnant to charge a person with *having done* an act and in the same breath to say he *attempted* to do it. The interpreting clause in the proviso to section 4 of the Antimoiety Act gives an unnatural import to the word smuggle. It, as we have already stated (*ante*, p. 42), provides that smuggling is the *act* of bringing goods into the United States without passing them through the custom-house without paying the duty, or the *act* of bringing goods into the United States without submitting them to the officers of the revenue without paying the duty, as well as the *act* of *attempting* to bring goods into the United States without passing the same through the custom-house without paying the duty, or the *act* of *attempting* to bring goods into the United States, with-

out submitting them to the officers of the revenue for examination, without paying the duty. This statute merely defines the word smuggling and furnishes a rule for the interpretation of the word smuggle, as found in the Anti-moiety Act, and which interpreting clause it is sought to extend as an interpreting clause to Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565). It furnishes no rule for the interpretation of an indictment, and does not purport to make an attempt to smuggle a distinct offense, punishable by a fine or imprisonment or both. The indictment charges smuggling and does not charge an attempt to smuggle, and the interpreting clause furnishes no rule for the interpretation of the indictment. The Act of June 1, 1872 (17 Stat., 196, 198), now Sec. 1035, Rev. Stat., only permits the jury to find a defendant guilty of an attempt to commit the offense charged, *provided such attempt be itself a separate offense.*

To charge a person in an indictment with smuggling is to charge him with the completed act. The interpreting clause furnishes no rule for the interpretation of the indictment. To charge a person with an attempt to smuggle is to charge him with an interrupted overt act, which, if completed, constituted the offense. The interpreting clause furnishes no rule for the interpretation of the indictment. In either case in law, as declared by the interpreting clause, it is the one crime of smuggling, although logically and grammatically and according to the ordinary use of language one is inconsistent with and contradicts the other. The indictment did not charge an attempt, and an attempt is not made a separate offense. It, therefore, follows that the question of an attempt is not presented on the record.

(*c.*) (5.) *The facts do not make out a case of attempt to smuggle.*

In this case there was a mere unexecuted intention to make an attempt to smuggle; or, at most, a preparation,

accompanied with an intention to make an attempt to smuggle. The acts of preparation were, first, an omission of a consular invoice, which would be one step in the preparation; carrying the diamonds to the ship at Liverpool, which would be a second step in the preparation; carrying the diamonds aboard the ship at Liverpool, which would be a third step in the preparation; carrying the diamonds to the state-room at Liverpool, which would be a fourth step in the preparation; putting the diamonds in a drawer in the state-room at Liverpool, which would be a fifth step in the preparation; omitting the diamonds from the manifest, which would be a sixth step in the preparation; steaming the vessel into the high seas, which would be a seventh step in the preparation; steaming the ship into the port of Philadelphia, which would be the eighth step in the preparation; omitting to deliver a manifest containing the diamonds, which would be a ninth step in the preparation. There was no *overt act* thereafter to land the diamonds; no *overt act* to bring into the United States without passing the same through the custom-house; no *overt act* of bringing into the United States without submitting the diamonds to the revenue officers for examination, *and the only overt acts were overt acts of preparation.* Revenue Officer Gallen testified (*ante*, pp. 18–19) that he went to the chart-room, and asked if there were a package for certain-named persons, and that Captain Loesewitz replied: "I have a package for Van Reeth, of 21 West Fourth Street, Cincinnati, Ohio, *and I will give it to you if you have an order for it.*" Gallen said, as testified to by him, "*Captain, I have an order for them.*" Loesewitz said, "*Show me the order and I will get the package.*" Gallen testified that he replied, "Captain, I would like to *see* the package *first, before delivering the order.*" Gallen testified that Captain Loesewitz went to his room, and that he (Gallen) followed him there; and that Captain Loesewitz, just as he came from his room with a package in his hand, he (Gallen) said, "Captain, that is the package I want."

Loesewitz replied, "*Where is your order?*" The following *then* took place, as testified to by Gallen: "*I produced my card as United States Treasury Agent. He refused to let me have it until I was identified as a custom-house officer.*" Upon Gallen being identified as a customs officer, Loesewitz handed the package to Gallen.

Gallen was asked: "*Did you tell him by what authority?*" and Gallen answered, "*Yes, sir; I told him I was United States Treasury Agent; and this package, containing diamonds, was not on the manifest.*" It is, therefore, apparent from this evidence that Loesewitz did not start with the package of diamonds to take them into the United States without passing them through the custom-house, or without submitting them to the officers of the revenue for examination. It is an *act* of that character which is denominated smuggling in the interpreting clause forming proviso to Sec. 4 of the Anti-moiety Act, and an attempt to do an *act* of that character which is also denominated smuggling. The production of an order, genuine or fictitious, was made *a condition precedent* to a delivery of the diamonds to Gallen as a *carrier* to do the *act* of taking the diamonds into the United States without passing the same through the custom-house or submitting them to an officer of the revenue for examination. Although the intent to smuggle might exist, and although the intent to make Gallen the carrier to do the *act* of taking the diamonds into the United States without passing them through the custom-house or submitting them to the officers of the revenue for examination. *But as a matter of fact he did not make Gallen his carrier, and would not and did not intend to make Gallen his carrier unless Gallen should perform the condition precedent — to wit,* produce an order. If Gallen, as a detective, had produced a fictitious order, and Loesewitz, relying thereon, had delivered the package to Gallen, and Gallen had done the *act* of one step in the *act* of taking the diamonds into the United States without passing them through the custom-

house, then there would have been an overt act of an attempt to take the diamonds into the United States without passing them through the custom-house or submitted them to an officer of the revenue for examination. But no such state of facts appears in the record; and when Captain Loesewitz went to his room and took the package in his own hands and held it there, and declined to give it up until there was performed the promise of producing an order, there was merely a tenth step in the preparation, and *it was but another overt act of preparation, and not an overt act* of smuggling interrupted. When Loesewitz did deliver up the package to Gallen, it was after Loesewitz had asked Gallen, "*Where is your order?*" (*ante*, p. 18), and *after* Gallen had produced his card as United States Treasury Agent, and after he (Gallen) had been identified as such. So that when the diamonds were handed to Mr. Gallen, they were handed to him in his capacity of a United States Treasury Agent (*ante*, p. 18), and Loesewitz did the very thing which the statute said to do was *not* smuggling.

Witness James C. Cummings, Special Treasury Agent, testifies to but a part of the conversation (*ante*, p. 19), and the part testified to is substantially the same as testified to by Gallen.

Merely because there was the crime of failing to get a consular invoice, or of omitting goods from the manifest, or of failing to deliver the manifest, or because the acts testified to may have constituted an unlawful importation under the provisions of Section 4 of the Act of July 14, 1866 (14 Stat., 178, 179), now Sec. 3082, Rev. Stat., and merely because in this case there could be no conviction of importing contrary to law, because the first count of the indictment was fatally defective (Original Brief, pp. 22–25; Revised Brief, pp. 23–26; *Brief in Reply, pp. 1–12*) would not authorize a conviction for an attempt to smuggle when, by the over-zeal of a treasury official, no overt act toward landing the diamonds was done.

There is a wide distinction between an attempt and an intent; and there is a wider distinction between the acts constituting an attempt and acts constituting preparation. The proviso to Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186; *ante*, p. 29), defines smuggling for the purposes of that act. This intepreting clause to the Anti-moiety Act *for the purposes of that act* is the only Federal statute which makes any reference to "an attempt to smuggle," and if it be proper to consider the matter of an attempt, we must look to that law. We have already shown (*ante*, pp. 54–57) that at most there were mere overt acts of preparation to make an attempt to smuggle without any overt act of an attempt; an unexecuted intention, and no overt act done beyond the acts of preparation. An attempt is an *interrupted overt act* done *after* all acts of preparation were fully completed, and which interrupted *overt act* has failed to bring about the result which would have given it the character of the principal crime if it had not been interrupted. An *overt act*, which would have been of the character of the principal crime, would have taken place had Gallen procured the diamonds on a fictitious order and started with this package in his possession toward the land to carry out an intent of Loesewitz not to pass the diamonds through the custom-house or not to submit them to an officer of the revenue for examination. But, on the facts presented, there was no *carrier*, and *Captain Loesewitz did not intend that there should be a carrier until the performance of a condition precedent; namely, the production of an order, purporting to come from Keck or the consignee* (*ante*, pp. 18–19).

There was no moving of the diamonds from the state-room toward the United States, where the custom-house is located, interrupted before reaching the land. All preparations had been completed, either to bring them in lawfully by passing them through the custom-house or submitting them to the officers of the revenue for examination, on the one hand, or

of attempting to pass them from the state-room to the land without passing them through the custom-house, or submitting them to the officers of the revenue for examination, on the other hand. No overt act had yet been done, no matter how many acts of preparation or what the secret intention.

The foregoing propositions are fully sustained by the authorities. The following is laid down in Holmes' Common Law (1885), 65, that:

"There is another class of cases in which intent plays an important part, for quite different reasons from those which have been offered to account for the law of malicious mischief. The most obvious examples of this class are criminal attempts. Attempt and intent, of course, are two distinct things. Intent to commit a crime is not itself criminal. There is no law against a man's intending to commit a murder the day after to-morrow. The law only deals with conduct. An attempt is an overt act. It differs from the attempted crime in this, that *the act has failed to bring about the result which would have given it the character of the principal crime.*"

In the case of *People vs. Murray* (1859), 14 Cal., 159, *Mr. Chief Justice Field* (at p. 159), laid down the following proposition:

"Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made."

So in the case on trial it is clear that all the means and measures for the commission of the offense were completed, and preparations made, but there was no direct movement toward the commission after the preparations were complete.

The case of *Mulligan vs. People*, 5 Parker's Criminal Reports, 105, decided by the General Term of the Supreme Court of New York in February, 1861 (Clerke, Sutherland, and Allen, Justices), is an interesting one as illustrating the difference between overt acts of preparation and overt acts of at-

tempt after the acts of preparation. It appears that William Mulligan became involved in a row in a gambling house. Upon being threatened with eviction, drew and pointed an uncocked Colt's revolver at the officer and threatened to shoot. There was no evidence of an attempt to cock the pistol or to pull the trigger. He was prosecuted under the statute which punished every person who should be convicted of shooting at another, or attempting to discharge any kind of fire-arms, with intent to kill, maim, etc. (page 109). At the close of the evidence the Court was requested to charge the jury that the pointing of an uncocked Colt's revolver at a person is not an attempt to discharge the weapon. The Court refused the request, and the ruling of the Court was assigned for error. *Justice Allen*, who delivered the opinion of the Court, said (page 109) that:

"The question presented is, whether a conviction can be had for an attempt to discharge a pistol when the individual indicted has proceeded no further toward an actual discharge of shooting than to raise and point the pistol, uncocked, at the party threatened. There was no evidence of an attempt to cock the pistol, or to pull the trigger, and the jury would have been warranted in finding that the prisoner merely raised the pistol and pointed it at the officer, making the qualified threat before stated. The instruction was properly asked for upon the evidence. *The threat constituted no part of the attempt to discharge the pistol, and was only evidence of the intention of the prisoner.*"

The Court further stated (page 111):

"It is not an attempt to discharge a loaded gun or pistol to put oneself in a situation in connection with the gun or pistol that it may be discharged. A mere getting it in readiness to discharge is not an attempt to discharge it. Upon the trial, an assault with intent to kill was confounded with the specific, statutory, and entirely different offense charged, an attempt to discharge a loaded pistol with the like intent. The act, the attempt to commit which was made an offense, was the discharge of fire-arms. No matter what other offense was committed against the laws, or the person of the officer, if this

offense was not committed, the prisoner was wrongfully convicted. It is far from certain that any offense was committed by the prisoner, but of that we are not the judges. We are only to decide upon the present conviction."

The Court again said (at p. 112):

"An attempt is an endeavor to do an act carried beyond mere preparation, but falling short of execution of the ultimate design (Bouvier's Law Dic.). Loading a pistol would be a preparation to shoot, but not an attempt to discharge. So, to get possession of a pistol, to take it from the pocket, and to point it, would be a preparation to discharge it, but not an attempt to discharge it. It may not always be easy to determine where the line is which separates a preparation to perform a given act from an attempt to perform the act. But the act, which is characterized as an attempt, must be proximate to the principal thing to be accomplished, a means to the end, and the pointing of a pistol uncocked is not an attempt to discharge it, punishable under the statute. Fire-arms are usually discharged by drawing a trigger, but they may be discharged in any way by which the powder can be ignited and made to explode, and the attempts to discharge may be as diversified as the means of discharge are various, but can only be by some act which, carried out and perfected, will result in a discharge."

In the case at bar the question is, whether Mr. Herman Keck, plaintiff in error, has done an overt act by attempting to smuggle in violation of Sec. 19 of the Act of Aug. 40, 1842 (5 Stat., 540, 565), now Sec. 2865, Rev. Stat., and not whether he did or attempted to violate any other provision of law. *Mr. Chief Justice Field* (at p. 159), in *People vs. Murray* (1859), 14 Cal., 159.

In *Kelly vs. Commonwealth*, 1 Grant Cases (S. C. Pa.), 484, the defendant was indicted for killing in an attempt to commit rape. The evidence disclosed the killing of a man, and no overt act of force toward the commission of a criminal assault upon his daughter. The Court held that the facts did not make a case for an attempt to commit rape, reversed the conviction because "acts are necessary to constitute an attempt; and an attempt to commit a rape is an ineffectual offer by force to have carnal connection."

It is laid down in *State vs. Wilson* (1862), 30 Conn., 500, that the overt act charged as constituting the attempt must be such as is in itself adapted to produce the effect intended. In the case at bar such overt act would have consisted in Gallen having gotten the diamonds by a fictitious order, and moving them toward land with the intention of not passing them through the custom-house or submitting them to the revenue officers for examination. But no such overt act was done or attempted to be done, or interrupted, and, therefore, there was no attempt.

It, therefore, follows that assignment of error number ten (*ante*, pp. 39–40) is well taken, because the Court refused to instruct the jury to find the defendant not guilty on the bill of indictment. The third count of the bill of indictment had been disposed of when the Court gave instruction number seven to find the defendant not guilty thereon (record, p. 111), and the first count is clearly bad, as has been heretofore presented in our former briefs. (Original Brief, pp. 22–25; Revised Brief, pp. 23–26; *Brief in Reply, pp. 1–12.*)

It also follows that assignment number twelve (*ante*, p. 40) is well taken, because the Court refused to instruct the jury to find the defendant not guilty on the second count of the bill of indictment, which is the count charging the defendant with smuggling.

(*e.*) (*6.*) *The facts do not constitute an attempt to smuggle according to the testimony of Captain Loesewitz.*

After the Rhynland reached the port of Philadelphia, the following took place, as testified to by the witness, Captain Frank Loesewitz (record, p. 27; *ante*, p. 17), to wit:

"Two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, yes. I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally on my part, I asked them who they were. They said they were treasury agents; and

said, Captain, that is a package of diamonds you have got, to be sent to Cincinnati, and if I didn't deliver it I would be arrested. After a while I went down in my room and brought the package up and delivered it over to the treasury agents. That's all that happened."

Captain Loesewitz also testified (record, pp. 35–37):

Q. "Have you not been in the habit of bringing packages over for friends?"

A. "I have brought packages over — little presents that I thought weren't valuable; but I never omitted to go to the custom-house officers and ask them if I might pass them on the dock; only things that contained no valuables."

Q. "*Did you go to the custom-house officers in this case before they went to you?*"

A. "*I had just arrived. I wasn't ashore.*"

Q. "The passengers were on the wharf?"

A. "Yes, sir; the passengers were landed."

Q. "You had made out your manifest, had you not?"

A. "The manifest is always made before we land."

Q. "Where do the officers come aboard?"

A. "Alongside the dock. Which officers do you mean."

A. "I mean the custom-house officers."

A. "They come aboard on the river."

Q. "At quarantine?"

A. "Yes, sir."

Q. "How long had they been aboard before you had landed your passengers?"

A. "It may have been half an hour before we landed them or an hour; I don't know exactly."

Q. "At that time the passengers were making declarations of what they had, and swearing to them before the custom-house officers?

A. "Yes, sir; they are always down in the saloon then."

Q. "Making their declarations to the custom officers?"

A. "Yes, sir; but we are not present then."

Q. "Did you permit the custom-house officers to leave that ship and go on the wharf without telling them that you had this package, and ask them whether you could land it?"

A. "The passengers were on land; every one was on land. It wasn't a thing of importance.

Q. "Did you not say that you always did ask them?"

A. "No, sir; I didn't say that."

Q. "I understood you to say it."

A. "*You asked if I brought packages over before, and I said I always went on shore and asked the custom-house officers on the dock.*"

Q. "Why should you not ask the other custom-house officers when they are on board the ship? Why wait until they get off on the wharf?"

A. "Because they never asked before that—little things."

Q. "You have said that when you brought packages over before of no value, that you always asked the custom-house officers if you could land them. Did you not say that?"

A. "Yes, sir; on the dock."

Q. "Why do you wait until you get on the dock?"

A. "Because I didn't ask them before."

Q. "Did you always wait until they get on the dock?"

A. "Yes; when I have something."

Q. "Did you ask them on the dock this time, or wait until they came to you?"

A. "No, sir; I didn't ask anything this time."

Q. "You waited until the officers came to you, did you?"

A. "The officers didn't come to me; Mr. Gallen, the treasury agent, came aboard."

Q. "When he came he came from the wharf, did he not?"

A. "Yes, sir."

Q. "He had been on the vessel before?"

A. "I don't know that."

Q. "You saw the custom-house officers there?"

A. "Yes, sir; they are always on board when we arrive."

Captain Loesewitz also testified (record, pp. 40–41):

Q. "Just before you get into port, state whether or not you are busy?"

A. "Yes, sir."

Q. "On this particular day were you, as a captain, very busy when you came into port?"

A. "Yes, sir. We are always on the bridge until the ship gets landed."

Q. "As a captain you have considerable to do?"

A. "Yes, sir; we always stand on the bridge going up the river."

Q. "What were you doing at the time Mr. Gallen came into your room?"

A. "I was filling my abstract of log."

Q. "That is one of the things that has to be done at the end of a journey?"

A. "Yes, sir."

Q. "After the passengers have been cleared by the custom-house officers the captain can then have the opportunity to speak to them?"

A. "Yes, sir."

Q. "Had all the passengers landed at that time?"

A. "Yes, sir."

Q. "How long before they had all landed?"

A. "May be a half hour."

There was, according to his evidence, no interrupted overt act of bringing in of the diamonds from the state-room of the steamer Rhynland, where they had been lying since put there at Liverpool; no interrupted overt act of an introduction of the diamonds from the state-room of the steamer Rhynland, where they had been lying since put there at Liverpool; no moving of the diamonds from said state-room toward the land, interrupted before reaching the land. All preparations had been completed, either to bring them in lawfully by passing them through the custom house, or submitting them to the officers of the revenue for examination, on the one hand; or, of attempting to pass them from the state-room to the shore without passing them through the custom-house, or submitting them to the officers of the revenue for examination, on the other hand. As provided in the proviso to Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), no overt act had yet been done, no matter how many acts of preparation or what the secret intention.

If, after the steamer Rhynland arrived, a stroke of lightning had sunk the ship, it is clear that up to that time there was no smuggling or an attempt to smuggle, although an offense of omitting to have a consular invoice, or omitting to put the goods on the manifest, or importing contrary to law, may have been committed (*ante*, pp. 46–49).

If, after the ship arrived, Captain Loesewitz had changed his mind and concluded either to pass the same through the custom-house, or submit them to the officers of the revenue, or returned them to Europe, it can hardly be claimed that there was smuggling, or an attempt to smuggle. Or if, after the ship had arrived, an officer of the Government should have demanded an examination, and Captain Loesewitz should thereupon submit them to the officer in his official capacity, it is clear that there had been no smuggling, and as yet no overt act of an attempt to smuggle. Or, as in this

case, the diamonds were lying in the cabin, just as they had been put at the port of Liverpool, and no move made toward taking them from the state-room to the land, there could not be smuggling or an attempt to smuggle, as there was no overt act toward bringing in, interrupted while being carried out. On the contrary, upon a revenue officer demanding the diamonds, in his official capacity, the Captain went to the state-room, got the diamonds, and they were submitted to the revenue officer for his examination (*ante*, pp. 62–63). What was done comes within the very language of the proviso to section four of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), as to acts which do *not* constitute smuggling or attempting to smuggle. By the language of the Anti moiety Act, *nonaction* is not an offense, but *an act*. We have already had occasion to comment on this (*ante* pp. 42–43). Nor is it to be forgotten that Captain Frank Loesewitz testified (*ante* pp. 63–64) that he had been in the habit of bringing over small packages in the same way he brought the package in the case or trial, and after the vessel had been docked he would go to a custom officer on the dock and report the fact, but that in this case he had no time to go on the dock, as the Treasury Agents came aboard before he had an opportunity to go upon the dock.

The authorities above cited (*ante* pp. 59–62) are equally applicable to the testimony of Captain Loesewitz as to that of Gallen and Cummings, and, therefore, will not be repeated.

The Court's special attention was called to this matter by request number five (record, pp. 110–11), (*ante*, p. 41) in the following language, to-wit:

"No. 5. The jury are instructed that the defendant, Herman Keck, is charged with smuggling and clandestinely introducing into the United States the diamonds mentioned in the indictment; they are further instructed that although they believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain

Loesewitz received said diamonds with the intention of not invoicing the same, or putting the same on his manifest, and delivering same in America without paying duty thereon, and put the same in his state-room on the steamer Rhynland, where they remained until said Captain Loesewitz was called upon to deliver same to Revenue Officer Gallen, and that when delivered to Revenue Officer Gallen, said Captain Loesewitz knew said Gallen to be a revenue officer, then and in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling, or clandestinely introducing, or attempting to bring in, and as to the crime so charged, your verdict must be not guilty."

The Court refused to give this instruction, to which ruling an exception was taken (record, p. 112), and the same was assigned as number thirteen in the assignment of errors (record, p. 116), and is set forth in the petition for a writ of error (record, p. 119).

It, therefore, follows that assignment of error number seventeen (*ante*, p. 40) is well taken, because the Court instructed the jury to find the defendant guilty if they believed "*the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here.*"

It also follows that assignment of error number sixteen (*ante*, p. 40–41) is well taken, because the Court, in response to a request for a special instruction, told the jury that they must find the defendant guilty if they find the defendant guilty "*of the smuggling charged as testified to by Captain Loesewitz.*"

It also follows that assignment of error number thirteen (*ante*, p. 41) is well taken, because the Court refused to give special instruction number five, covering the matter of an attempt.

V.

Smuggling is Not Importing Contrary to Law.

(1.) In interpreting the statutes of a government, full force and effect shall be given to each section of said statutes. In order so to do courts will so construe one section as not to defeat, annul, or destroy another, but to explain and support it.—*Post pp. 68-70.*

(2.) Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., punishes smuggling and is necessarily confined to overt acts done after an obligation has arisen to pay duty, and, therefore, after the importation is complete. Sec. 4 of the Act of July 14, 1866 (14 Stat., 178, 179), now Sec. 3082, Rev. Stat., by its terms punishes importing contrary to law. It, therefore, pertains to unlawfulness in matters pertaining to the port and not to overt acts after the importation is complete.—*Post pp. 68-72.*

(3.) Therefore, smuggling is not importing contrary to law, but an offense distinct therefrom and which can only arise after the importation is complete. *Post, pp. 68-72.*

It was contended by the learned Assistant Attorney-General (*Mr. Whitney*) that the goods were imported, and that if imported they were smuggled. This conclusion does not follow. In his brief he asks the question, "Were the goods imported?" and, having argued that the goods were imported, asserts that, therefore, the case is one of smuggling. Smuggling is not the only offense against the revenue laws. Among the long list of offenses against the revenue laws (some of which we have set out, *ante*, pp. 25–26) is the offense known as "*importing*, or bringing in contrary to law." This crime is founded on section four (4) of the Act of July 14,

1866 (14 Stat., 179), now Sec. 3082, Rev. Stat. It is a settled rule of construction that full force and effect is to be given to all the provisions of the law, and, when necessary, general language of one section is to be restricted so as to give full force and effect to the language of other sections. In order, therefore, to give full force and effect to Sec. 3082 and Sec. 2865, violations of the statutes in reference to "*importing*" would be included within and be covered by Section 3082. *Market Co. vs. Hoffman* (1879), 101 U. S., 112, 115–116; *Bernier vs. Bernier* (1893), 147 U. S., 242, 246; *Seymour vs. Ry. Co.* (1886), 44 Ohio St., 12, 19; *Kemper vs. Campbell* (1886), 44 Ohio St., 210.

In one of the cases cited (*Seymour vs. Ry. Co.*, 44 Ohio St., 12) plaintiff sued defendant railway company for killing domestic animals by reason of want of a fence required by statute. The question was whether the action was barred in four or six years. Sec. 4981 of the Rev. Stat. of Ohio placed a six-year limitation on liabilities created by statute. Rev. Stat., Sec. 4982, placed a limitation of four years on all torts. *Johnson, J.*, said (p. 19) that:

"These two sections must be construed together so as to give each force. If we should say that this cause of action came under [Section] 4982, we would be compelled to hold that it was not a liability created by statute, or that both four and six years applied to it; but by holding as we do, that Section 4982 applies to injuries and wrongs to person or property other than those to perform a statutory duty, *we give force and effect to both sections.* This statute requiring railroads to be fenced, and making them liable for damages to personal property by reason of such failure, creates a statutory liability which is barred in six years. While Section 4982 is given full force by limiting it to common-law liabilities for wrongful acts, neglect, or default, such a construction *harmonizes and gives full force to both sections.*"

The same court, in *Kemper vs. Campbell*, 44 Ohio St., 210 (1886), gave full force and effect to both Sections 4133 and 4134 of the Revised Statutes of Ohio, by limiting the word,

"mortgage," in Section 4133, to one which was a mortgage on its face, and limiting the word "incumbrance," contained in Section 4134, to a mortgage which was not such on its face.

In *Bernier vs. Bernier* (1893), 147 U. S., 242, *Mr. Justice Field* said (at p. 246) that:

"It is a general rule, without exception in construing statutes, that effect must be given to all their provisions if such a construction is consistent with the general purposes of the act and the provisions are not necessarily conflicting. *All acts of the legislature should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it.*"

Applying these rules, the argument of the learned Assistant Attorney-General would be entitled to weight *if* it were intended to show that plaintiff in error, Mr. Herman Keck, was guilty under Section 3082 of "*importing* contrary to law." The first count of the indictment was based on Section 3082, and as we have shown (Original Brief, pp. 22–25; Revised Brief, pp. 23–26; *Brief in Reply, pp. 1–12*), this count is fatally defective, and a conviction cannot be sustained; and if the evidence would sustain a conviction under Section 3082, and the count of the indictment based thereon was fatally defective, a verdict cannot be sustained under Section 2865, which the evidence does not fit.

It is conceded that the word "import" means to bring goods, wares, and merchandise into a port of the United States with intent to land them (*ante*, pp. 44–47), and if it be further conceded that the diamonds charged in the second count of the indictment were brought within the port of Philadelphia with intent to land the same and with the further intent to defraud the revenue of the United States, it does not follow that the defendant is guilty under Sec. 19, of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. Under the Act of March 2, 1799 (1 Stat., 646, Sec. 24), to import goods, wares, and merchandise into the United

States, with no bill of lading, no invoice, and no manifest, with intent to defraud the revenue of the United States was clearly unlawful. But the penalty was forfeiture of the goods and the payment of an amount equal to the value of the goods, and this was the only penalty. It was never contended that such a state of facts constituted smuggling or clandestinely introducing into the United States. In the case of *United States vs. 10,000 Cigars* (1855), 2 Curtis, 436, it appears that cigars were put aboard a vessel in Cuba without a bill of lading, invoice, or manifest, with the intent that the master would smuggle them and deliver them to Mr. Davis at Portland. On the arrival of the vessel the cigars were seized. The question was, whether the goods had been *imported into the United States. This was a case of importing contrary to law*, and the penaltv for this conduct was the forfeiture of the cigars and the payment of an amount equal to their value. It was not until the Act of July 18, 1866 (14 Stat., 179, Sec. 4), now Sec. 3082, Rev. Stat., that a penalty of fine or imprisonment, or both, was imposed for this offense. *Stockwell vs. United States* (1871), 13 Wall., 531, 551-552. When Congress came to pass the Act of February 27, 1877 (19 Stat., 247), restoring Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), as Sec. 2865, Rev. Stat. (*ante*, pp. 6-8), it was easy for Congress, if it intended to punish acts of irregular importing, to have expressly said so. The word "import" had a well-defined meaning, and if Congress intended to punish "importing with intent to defraud the revenues of the United States," it would have used the word "import" instead of the word "smuggle." It is not to be presumed that Congress would pass a law, in 1877, upon a subject which had been legislated upon in 1866, and which appeared in the revision of 1874 as Section 3082, and was in full force and effect in 1877, is still in full force and effect, and on which the fatally defective first count of the indictment is predicated. Congress is not presumed to do a vain thing. Even if it be

conceded that the Government had the right to seize the diamonds and forfeit them to the United States, because imported contrary to law, with intent to defraud the revenue, it does not follow that they were smuggled. At most there was an unexecuted intention to smuggle.

The contentions of the learned Assistant Attorney-General can only be sustained by adopting a rule that there are constructive crimes, that a criminal statute may be construed to cover cases not falling within its term, and that conjecture is to be substituted for interpretation. The following, from Lieber's Hermeneutics, 9, is in point:

"The idea, involved in the term interpretation, that we have to discover the true meaning of signs, and represent it to others, implies, likewise, that we proceed in doing so on safe ground, according to rules established by reason, and not arbitrarily or whimsically. On this account, interpretation, and, as will be seen in the sequel, construction, are distinct from conjecture."

VI.

The Crime of Smuggling was Not Committed, Because the Law Did Not Require an Invoice.

(1.) The offense of smuggling under Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., can only exist as to goods which the law requires to be invoiced.—*Post pp. 73-74.*

(2.) Sec. 4 of the Act of June 10, 1890 (26 Stat., 131), divides goods into two classes, (*a*) those which must be invoiced, and (*b*) those which need not be invoiced. Personal effects accompanying a passenger need not be invoiced.—*Post p. 74.*

(3.) A Captain of a steamship does not cease to be a passenger by being a Captain, and he is not required to invoice goods which, when accompanying any other passenger, it would not be necessary to invoice.—*Post pp. 74-75.*

(4.) **A Captain of a steamship, who procured a package of diamonds in Antwerp, put it in his state-room at Liverpool and steamed his ship into the port of Philadelphia, cannot be guilty of smuggling said diamonds, because the law did not require that they should have been invoiced.—** ***Post pp. 74-75.***

(*a.*) *The elements of the crime.*

The offense of smuggling, for which a punishment is prescribed in Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., consists of eight elements, to wit:

(1.) Smuggling,
(2.) Goods, wares, or merchandise,
(3.) *Which should have been invoiced,*
(4.) And as to which the invoice is omitted,
(5.) Goods, etc., subject to duty,
(6.) The duty not being paid,
(7.) Done knowingly and willfully,
(8.) All with intent to defraud the revenue of the United States.

In *United States vs. Nolton* (1867), 5 Blatchford, 427, the defendant was indicted for smuggling goods from Canada into the United States in violation of Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. This section then, as now, made it a crime *to smuggle goods "which should have been invoiced."* As section one (1) of the Act of March 2, 1821 (3 Stat., 616), did *not* require "*an invoice*" when goods were brought into the United States from an adjoining country (Canada), *Mr. Circuit Justice Nelson* quashed the indictment, and held that there could be no violation of Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat.

(*b.*) *When an invoice is required.*

Section 4 of the Act of June 10, 1890 (26 Stat., 131), to simplify the laws in relation to the collection of the revenues, provides, among other things, as follows, to wit:

"SEC. 4. That, *except in case of personal effects accompanying the passenger*, no importation of any merchandise exceeding $100.00 in dutiable value shall be admitted to entry without the production of a duly certified invoice thereof as required by law, or of an affidavit made by the owner, importer, or consignee before the collector or his deputy, showing why it is impracticable to produce such invoice."

The words, "*except in case of personal effects accompanying the passenger*," divided goods to be brought into the United States into two classes:

FIRST.—Goods which must be invoiced, and as to which it is possible to violate Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., and be guilty of smuggling;

SECOND.—Goods which need not be invoiced, and as to which it is impossible to violate Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., and as to which one cannot be guilty of smuggling.

The word, "*effects*," means goods, movables, or personal estate; the word, "*personal*," means pertaining to a person, movables, chattels; the words, "*personal effects*," mean movables, or chattels; the word, "*accompanying*," means going with; the word, "*passenger*," means one who is making a passage. In the case at bar, the diamonds were personal effects; the diamonds accompanied Captain Loesewitz; and Captain Loesewitz was a passenger. Therefore, there being no legal obligation to have an invoice, there could be no violation of Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat. *United States vs. Nolton* (1867), 5 Blatchford, 427. If it be said that Frank Loesewitz was Captain of the steamer Rhynland, and, therefore, does not

come within the language of this section, that argument fails, because he did not cease to be a passenger by being a Captain. To construe the word, "passenger," to exclude a person, who, being not only a passenger, but something else, to wit, a Captain, would lead to absurd consequences, because such construction would require a Captain, who is as well a passenger, to invoice personal effects, which, when accompanying any other passenger, it would not be necessary to invoice.

It, therefore, follows that one element of the crime of smuggling, for which a punishment is prescribed by Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., does not exist. *United States vs. Nolton* (1867), 5 Blatchford, 427.

(*c.*) *Assignments of Error.*

It, therefore, follows that assignment of error number ten (*ante*, pp. 39–40) is well taken, because the Court refused to instruct the jury to find a verdict of not guilty.

It also follows that assignment of error number twelve (*ante*, p. 40) is well taken, because the Court refused to instruct the jury to find a verdict of not guilty on the second count of the indictment which charged smuggling.

It also follows that assignment of error number seventeen (*ante*, p. 40) is well taken, because the Court instructed the jury to find the defendant guilty if they believed "the statements made here under oath by Captain Loesewitz."

It also follows that assignment of error number sixteen (*ante*, pp. 40–41) is well taken, because the Court instructed the jury to find the defendant guilty if they believed defendant guilty "of the smuggling charged as testified to by Captain Loesewitz."

It also follows that assignment of error number thirteen (*ante*, p. 41) is well taken, because the Court refused to give special instruction, number five (5).

VII.

Errors in Rulings as to the Corpus Delicti.

(1.) Without proof of the *corpus delicti* there can be no conviction in a criminal case; if the *corpus delicti* fail of identification, there can be no conviction in a criminal case.—*Post p. 76.*

(2.) Where a captain testified that he was given a package, the property of a stranger in Antwerp, and that he wrote thereon an address, and the package seized had no address thereon; and that he had been in the habit of bringing over small packages: and that he did, and that he did not, know the consignee; it is error for the Court to instruct the jury that they must find the defendant (who was the stranger referred to) guilty if they believe the *testimony* of the captain to be true.—*Post pp. 76-79.*

(*a.*) *The corpus delicti.*

Without proof of the *corpus delicti* there can be no conviction in a criminal case; if the *corpus delicti* fails of identification, there can be no conviction in a criminal case. Wharton, Criminal Evidence (9th Ed.), Sec. 325.

(*b.*) *The facts and the evidence.*

Captain Loesewitz testified as heretofore set out (*ante* pp. 16–17), and also testified (record, p. 34):

Q. "Where did you put the package—in your pocket loose?"
A. "I put it loose in my pocket."
Q. "Where did you put the paper?"
A. "Along with it—along with the box."
Q. "Loose?"
A. "Along with the box."

Q. "You never tied the paper to it?"
A. "No, sir."

* * * * * * * * * *

Q. "You put that address loose in your pocket, without attaching it to the package in any way?"
A. "Yes, sir."
Q. "When you got aboard the ship, where did you put the package?"
A. "In the drawer."
Q. "Where did you put the paper?"
A. "Afterwards I put it in a little case."
Q. "In a pocket-book or something of that kind?"
A. "Yes, sir; in a pocket-book."

By the Court:

Q. "Why did you not put the paper containing the address on the package—fasten it there? Why did you keep them separately?"
A. "I kept that, and put it afterwards with the package *in another paper, and wrote the address on myself.*"

Revenue Officer Gallen, who seized the package, testified (record p. 44) as follows:

Q. "Look at that box, and tell me whether that is the box?"
A. "Yes, sir; that is the box which I seized."
Q. "Was the box in that condition, with the exception of the tearing of the paper?"
A. "With the exception of the tearing of the paper. That paper was around the box, and then there was another seal right in the corner."
Q. "It was torn off in the tearing of the paper?"
A. "Yes, sir."
Q. "Was there any address whatever upon the box?"
A. "*No address on the box whatever.*"

Captain Loesewitz testified (record, p. 31) that he had with him the business card of jeweler Hendrickson, of Newark, New Jersey, which he gave to Van Hammelrick (record, p. 33); that he did and that he did not (record, p. 39) know that Van Reeth had come to Cincinnati in 1895, with a great number of others, to start a diamond-cutting establishment. He did not produce the piece of paper with the name

Van Reeth thereon just after his arrest, or when he claimed, he told all to the custom-house officer; he did not produce it at his own examination, and produced it for the first time March 18, months thereafter, at the hearing of Mr. Keck before United States Commissioner Bell (record, p. 52).

The package, therefore, seized by Revenue Officer Gallen is not positively identified as the package which Loesewitz claims was given him by Van Hammelrick, January 27, 1896, in the Café Alsacienne, on the Place Verte, in Antwerp, Belgium.

(*c.*) *The rulings of the Court and the assignments of error.*

The Court charged the jury, among other things (p. 112) as follows:

"It is sufficient to say in this respect that, *if the statements made here under oath, by Captain Loesewitz, respecting his receipt of the package of diamonds in Antwerp and bringing them here, are true*, the defendant is guilty of the offense charged."

An exception was noted (record, p. 113), and is assigned for error as number seventeen (record, p. 118).

Under this charge of the Court to the jury the inquiry becomes pertinent, *Which testimony?* The testimony of Captain Loesewitz was inconsistent with itself in important particulars. One story might be consistent with the theory of turpitude and the other with innocence. By the charge of Court it would then become immaterial which of the stories the jury should believe, either the one involving turpitude or the one consistent with innocence, because in either case the jury was bound to find the defendant guilty. Captain Loesewitz swore positively that he had been in the habit of bringing over similar small packages in the same way that he brought over the package seized by Revenue Officer Gallen; and that, after the vessel had been docked, he would go to a custom officer on the dock and report the fact; but that in

this case he had no time to go on the dock, as the Treasury Agents came aboard before he had an opportunity to go upon the dock (record, pp. 35–37; *ante*, pp. 63–65). He further positively testified, as above quoted, that the package claimed to have been given to him by Mr. Van Hammelrick, in Antwerp, had upon it an address which he wrote thereon himself. The package seized by the revenue officer had no address upon it, as testified to by Loesewitz and as testified to by Revenue Officer Gallen, as above quoted.

It is a reasonable hypothesis that the package seized by Revenue Officer Gallen was one of the packages, Captain Loesewitz testified, he had been in the habit of bringing over (record, pp. 36–37; *ante*, pp. 63–65).

The only mark of identification known to Captain Loesewitz was the address written by himself. No such box was seized; and it was at least a question for the jury to say whether the box on which he claimed to have put an address was the box which was seized, and upon which there was no address.

The plaintiff in error, Mr. Herman Keck, was presumed to be innocent until proven to be guilty beyond a reasonable doubt, and he was entitled to the benefit of any reasonable doubt arising from *all* the evidence. If there were any reasonable hypothesis consistent with his innocence or inconsistent with his guilt, he should have been acquitted. The Captain testified to better his own chances to get off (record, p. 42), and the case turned on the claimed ability of the witness, Captain Frank Loesewitz, to identify Mr. Herman Keck, a stranger whose name he did not know, whom he had seen for less than half an hour, during which a conversation was carried on in Flemish between Captain Loesewitz and Mr. Van Hammelrick. The charge of the Court violated all rules governing charges to juries. (See Revised Brief, p. 126–130.)

VIII.

Errors Summarized.

We will now briefly summarize first (1) the assignments of error heretofore discussed bearing on the question ordered to be re-argued by the Court (*ante* p. 1); and second (2), the assignments of error discussed in our former briefs.

(*1.*) *Assignments of error discussed in this brief.*

The five assignments of error discussed in this brief are as follows, to wit:

Tenth.— This ruling of the Court is set out *ante* p. 20; pp. 39–40. That this assignment of error should be sustained see *ante* p. 27; p. 50; p. 62; p. 75.

Twelfth. — This ruling is set out *ante* p. 20; p. 40. That this assignment of error should be sustained see *ante* p. 27; p. 50; p. 62; p. 75.

Thirteenth.— This ruling of the Court is set out *ante* p. 41. That this assignment of error should be sustained see *ante* pp. 66–67; p. 75.

Sixteenth.— This ruling is set out *ante* p. 21; p. 40. That this assignment of error should be sustained see *ante* p. 28; p. 51; p. 67; p. 75.

Seventeenth.— This ruling is set out *ante* pp. 20–21; pp. 40–41. That this assignment of error should be sustained see *ante* pp. 27–28; p. 51; p. 67; p. 75; p. 78.

(*2.*) *Assignments of error discussed in our former briefs.*

(*a.*) The first count of the indictment is fatally defective, and the demurrer thereto ought to have been sustained.

Revised Brief, pp. 23–26; *Brief in Reply*, pp. 1–12; *Ledbetter vs. United States* (1898), 170 U. S., 606, 610, 611, 614.

(*b.*) The second count of the indictment is fatally defective, and the demurrer thereto ought to have been sustained. Revised Brief, pp. 26–59; *Ledbetter vs. United States* (1898), 170 U. S., 606, 610, 611, 614.

(*c*) The second count of the indictment covered the crime of smuggling. Order for re-argument (*ante*, p. 1); Revised Brief, pp. 72–75; *United States vs. Sixty-seven Packages of Dry-goods* (1854), 17 Howard, 85, *Mr. Justice Nelson* at p. 93; *ante*, p. 7. The evidence makes out no crime. Revised Brief, pp. 73–75.

(*d.*) Evidence erroneously admitted. Revised Brief, pp. 91–106.

(*e.*) Evidence erroneously excluded. Revised Brief, pp. 106–123.

(*f.*) Manner of charging jury. Revised Brief, pp. 124–133.

(*g.*) Manner of answering request for special instruction. Revised Brief, pp. 134–136.

(*h.*) Error for refusing *dedimus*. Revised Brief, pp. 136–147.

(*i.*) Sentence erroneous. Revised Brief, pp. 147–149; *Reynolds vs. United States* (1878), 98 U. S., 145, 168–169 *note*.

In Conclusion.

Apparently in this case some doubt has existed in the mind of this Court as to the correct interpretation of a criminal statute. That it is better for ten guilty to escape than one

innocent suffer; that no one shall be deprived of his liberty without the judgment of his peers; that a verdict taking away the good name of a citizen shall be by the unanimous vote of twelve jurors; that an accused is presumed to be innocent until proved by the testimony of witnesses (who must meet him face to face), beyond a reasonable doubt, to be guilty; that the evidence must be consistent with every reasonable hypothesis of guilt and inconsistent with any reasonable hypothesis of innocence before a verdict of guilty can be returned; that criminal statutes must be strictly construed; and, that every reasonable doubt shall be resolved in favor of the accused, are rules as old as the law itself. If there be still a doubt in the mind of the Court as to the correct interpretation of the word smuggle that doubt should be resolved in favor of Mr. Herman Keck, plaintiff in error. *Baron Huddleston* well said in *Rumball vs. Schmidt* (1828), 8 Queen's Bench Division (L. R.), 603, 608, that where a "section [of a statute] imposes a penalty for a criminal offense, the appellant is entitled to the benefit of any doubt which may arise on the construction of it." In *Rex vs. Bond* (1818), 1 Barnewall & Alderson, 390, 392–393, *Lord Justice Abbott* said "it would be extremely wrong that a man should by a long train of conclusions be reasoned into a penalty, when the express words of the act of Parliament do not authorize it."

The arguments of the learned Assistant Attorneys-General in favor of constructive crimes is fully answered in the numerous cases heretofore referred to (*ante*, pp. 21–25; pp. 29–33), and no more strongly than in *France vs. United States* (1897), 164 U. S., 676, 683, where *Mr. Justice Peckham* said, "If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation." We know but one rule for the guidance of the bench and bar, as stated by *Sir Frederick Pollock*, "justice according to law"

(Pollock's Jurisprudence (1896) 28–54). If an amendment be thought wise in the law, an appeal may be had to the commission appointed under the Act of June 4, 1897 (30 Stat., 11, 58), and the Act of July 1, 1898 (30 Stat., 597, 643), to co-operate with the Attorney-General, in a revision of the penal laws of the United States.

We respectfully submit that the conviction should be set aside and the plaintiff in error discharged.

Respectfully submitted,

RANKIN DILWORTH JONES,
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Counsel for Herman Keck, Plaintiff in Error.

CINCINNATI, October 8, 1898.

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No. 15.

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Reply Brief of Plaintiff in Error

THIRD ORAL ARGUMENT.

Filed Nov. 10, 1898.

THE UNITED STATES OF AMERICA.

In the Supreme Court of the United States.

OCTOBER TERM, 1898,

No. 15.

October Term, 1897, No. 194.

October Term, 1896, No. 551.

HERMAN KECK, Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

RANKIN DILWORTH JONES,
FRANCIS BACON JAMES,
Counsel for Plaintiff in Error.

JONES & JAMES, Attorneys.

(16,330).

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THE UNITED STATES OF AMERICA.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

HERMAN KECK, *Plaintiff in Error.*	No. 15.	Oct. Term, 1898.
	No. 194.	Oct. Term, 1897.
vs.		
THE UNITED STATES, *Defendant in Error.*	No. 551. (16,330)	Oct. Term, 1896.

Reply Brief of Plaintiff in Error on Third Oral Argument

MAY IT PLEASE THE COURT:

The learned Assistant Attorney-General and District Attorney, counsel for the United States, defendant in error, have filed an elaborate brief upon the question directed to be re-argued, and many other subjects. In reply thereto, we respectfully submit the following brief, to wit:

I.

SMUGGLING DEFINED.

(1.) **Rev. Stat. (2d Ed.), Sec. 2865 is, and is to have the same meaning as, Sec. 19 of the Act of August 30, 1842 (5 Stat. 548, 565).— *Post pp. 2-5.***

(2.) The Act of February 27, 1877 (19 Stat. 240, 247) had for its sole object the correction of errors and the supplying of omissions in the text of Sec. 2865, Rev. Stat., and other sections, as its title indicates, and as its first section provides, so as to make the same truly express the statutes in force on the first day of December, 1873, and is in no respect new legislation, nor a new law enacted to take effect from the date of its passage, and its intention is to make Sec. 2865 read as it ought to have read in the printed volume of the Revised Statutes, in the shape in which it was in force on the first day of December, 1873, as Sec. 19 of the Act of August 30, 1842 (5 Stat. 548, 565,)— *Post pp. 2-5.*

(3.) The word "smuggle" is a technical word, having a known, accepted, and defined meaning at common law. When Congress, August 30, 1842, enacted a statute containing the word "smuggle" in Sec. 19 (5 Stat. 548, 565), it thereby adopted the common-law definition as the same is found in the treatises on the common law, and that definition is as necessarily included therein as much as if it stood in the text of the Act. Congress thereby made that common law a Federal Statute, and it derived its force and effect from that statute.— *Post pp. 5-13.*

(4.) Non-legal definitions of smuggling, which use the words import or export in a non-legal sense, do not define the offense of smuggling, and are not definitions thereof in a legal sense, and cannot be used to define the word smuggling found in a statute punishing that offense.— *Post pp. 13-20.*

(a). Rev. Stat. (2d. Ed.), Sec. 2865 is, and is to have the same meaning as, Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565).

As we have already shown (our brief, pp. 6–8) Rev. Stat.,

(2d. Ed.) Sec. 2865, is Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565). Because the part of Sec. 19 punishing smuggling was inadvertently omitted from the Federal written law between June 22, 1874, and February 27, 1877 (our brief, p. 8), it is contended that on its restoration a new meaning is to be given the same language (their brief, p. 42). A similar contention was unsuccessfully made in *United States vs. Auffmordt* (1877), 122 U. S., 197, 210. It was thus disposed of by *Mr. Justice Blatchford* (p. 210):

"But we are of opinion that the amendment made by the Act of February 18, 1875 [18 Stat., 316, 318] was similar to the Act of February 27, 1877, 19 Stat., 240], did not have the effect contended for. *Its sole object was to correct errors and supply omissions in the text of the Revised Statutes, as its title indicates, so as to make the same truly express the statutes in force on the 1st of December, 1873*, and it made special reference to the printed volume of the Revised Statutes. *It was in no respect new legislation; nor a new law enacted to take effect from the date of its passage*, in such wise as to alter any enactment made since the passage of the Revised Statutes. *The intention was to make Sec. 2864 read as it ought to have read in the printed volume*, in the shape in which it was in force on the 1st of December, 1873, as a part of Sec. 1 of the Act of March 3, 1863, c. 76, 12 Stat., 738. It left the Act of June 22, 1874, c. 391, to have its full effect in respect to Sec. 2864, in like manner as if the words 'or the value thereof' had been contained in that section, in the printed volume of the Revised Statutes. There was a law in force on December 1, 1873, and subsequently thereto, down to June 22, 1874, authorizing a forfeiture of the value of merchandise for the causes stated in the Sec. 2864, and the fact that forfeitures of such value might have been incurred during the intervening period between December 1, 1873, and June 22, 1874, was a sufficient reason for the correction made in Sec. 2864."

This court thus disposed of the precise question here presented.

The opinion of the trial court was to the same effect. *United States vs. Auffmordt* (1884), 19 Fed. Rep., 893.

In *McDonald vs. Hovey* (1884), 110 U. S. 619, *Mr. Justice Bradley* said (p. 629), that:

"Upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology."

In *United States vs. Ryder* (1884), 110 U. S., 729, *Mr. Justice Bradley* said (p. 740), that:

"It will not be inferred that the Legislature, in revising and consolidating the laws intended to change their policy, unless such intention be clearly expressed."

In *United States vs. Le Bris* (1887), 121 U. S., 278, *Mr. Chief Justice Waite* said (p. 280):

"Re-enacted sections are to be given the same meaning they had in the original statute, unless a contrary intention is plainly manifested."

It seems to be tacitly conceded that if the courts had in the year 1842 interpreted Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), that the word "smuggle" therein contained would have been given the definition of Hawkins, Russell, Gabbet, Bacon, and Gilbert. If that were the proper interpretation of the word when Congress adopted it, efflux of time could not change its meaning as used in that act. *Bridge Proprietors vs. Hoboken Company* (1864), 1 Wallace 116, 148; Maxwell on Interpretation of Statutes (3d London Edition,) 83; our brief, pp. 8–9. The Judicary Act of September 24, 1789 (1 Stat., 76), was interpreted in 1796 in the *Cassius*, 2 Dallas, 365, and in 1800 in *Evans vs. Bollen*, 4 Dallas, 342. Part of this act, with others, was embodied in the revision of December 1, 1873, approved June 22, 1874, as Sec. 629. On March 3, 1875 (18 Stat., 470), Congress passed "an Act to determine the jurisdiction of the Circuit Courts of the United States," and used the same language as that used in Sec. 9 of the Act of September 24, 1789 (1 Stat., 76). In *United States vs. Mooney* (1885), 116 U. S., 104, it was contended that a different meaning should be attached to these words in the new Act, but *Mr. Justice Woods* said (p. 106):

"It is not to be supposed that Congress, in using in the Act of 1875 the same language, so far as the present question is concerned, as that employed in the Act of 1789, intended to give it a meaning different from that put upon it by this court."

As we have already shown, the words of a statute must be understood *in the sense which they bore when it was passed. Bridge Proprietors vs. Hoboken Company* (1864), 1 Wallace, 116, 148; *Bischoff vs. Wethered* (1869), 9 Wallace 812, 816; Maxwell on Interpretation of Statutes (3d London Edition, 1896), 83; (our brief, p. 9). In *Bridge Proprietors vs. Hoboken Company* this court in the year 1864 gave the word "bridge" in a New Jersey statute of 1790, its meaning in 1790, although there had been no judicial determination of its meaning, and resort was had elsewhere.

(*b.*) *Authorities defining smuggling.*

The learned counsel for the United States, defendant in error, say in their brief (p. 13), that:

"The Supreme Court in the case of *United States vs. Dunbar* (156 U. S., 185), clearly approves Bouvier's definition of smuggling."

Congress, August 30, 1842, defined a specific crime by name, and that name was "*smuggling*." *Mr. Justice Storey* said in *United States vs. Smith* (1820), 5 Wheaton, 153, 160, "the definitions are necessarily included *as much as if they stood in the text of the Act.*" In Mill's Logic (Ed. Harper & Bro., 1888), Chap. II, Sec. 1, p. 29, it is stated:

"Section 1. 'A name,' says Hobbes, 'is a word taken at pleasure to serve for a mark which may raise in our mind a thought like to some thought we had before, and which being pronounced to others, may be to them *a sign of what thought the speaker had before in his mind.*' This simple definition of a name, as a word (or set of words) serving the double purpose of a mark to recall to ourselves the likeness of a former thought, and *a sign to make it known to others*, appears unexceptionable."

In Lieber's Hermeneutics (3d Ed., 1880), 10, it is stated:

"Those signs by which man most frequently endeavors to convey his ideas to another, and by which in most cases he best succeeds in conveying them, are words."

And again, at page 11:

"Interpretation is the art of finding out the true sense of any form of words; that is, *the sense which their author intended to convey*, and of enabling others *to derive from them the same idea which the author intended to convey*."

Mr. Justice Lamar makes the same statement in *Lake County vs. Rollins* (1889), 130 U. S., 662, 671, as follows:

"Words are the common signs that mankind make use of to declare their intention to one another."

The learned counsel for the United States, defendant in error, as already quoted, say in their brief (p. 13), that:

"The Supreme Court, in the case of the *United States vs. Dunbar* (156 U. S., 185), clearly approve Bouvier's definition of smuggling."

Bouvier cites as his authority "Bacon, Abr. *Smuggling*." The Supreme Court, therefore, accept the definition of Bacon. Bacon defines smuggling as set out in our brief (p. 11), and the same definition is given by Hawkins, Russell, and Gabbet (our brief, pp. 9–12). Bacon's Abridgement is chiefly the work of *Lord Chief Baron Gilbert* (Watt's Bibliotheca Britanica, Edinburg, 1824, Vol. I, par. 60 t.; Bridg. Leg. Bibiblog., 10; 2 Blackstone, 325, *note y*), thus adding to the definition the authority of a great name. Sir Geoffroy, or Jeffrey Gilbert, who was born in 1674, entered the Inner Temple in 1692, was called to the bar in 1698, appointed Judge of the Irish King's Bench in 1714, Chief Baron of the Irish Exchequer in 1715, Baron of the English Exchequer in 1722, Second Commissioner of the Great Seal in 1725, and Chief Baron of the Exchequer in the same year. He was invested with the coif, knighted, and was connected with the

great case of *Annesley vs. Sherlock* (Vol. 15, State Trials, pp. 1301–1316), which settled the right of the English House of Lords to entertain an appeal from the Irish House of Lords. For carrying out the decree of the English House of Lords, he was committed by the Irish House of Lords. He died in 1726. None of his numerous works appeared in his lifetime, and after his death some were published over his own name, as Reports of Equity Cases (as to which he began to take notes in 1706), histories of the Courts of Exchequer, Common Pleas, and Chancery, Commentaries on Uses and Trusts, Tenures, Devices, Ejectments, Distresses, Execution, Rents, Remainders and Evidence, and others, over the names of his editors as the Abridgement of the Law. The "Abridgement of the Law" (which appears over the name of the editor, Matthew Bacon,) and his "Law of Evidence" have been the most enduring of his works.

While the high authority of Hawkins, Russell, and Bacon (our brief, pp. 9–11, 27) is not questioned, in the brief of the learned counsel for the United States, defendant in error, "Gabbet's Criminal Law" is assailed (their brief, p. 10) as "obscure and without great weight." Without having time to examine every criminal case decided by this court for citations of Gabbet, we notice that in the year 1878, in one of the cases heretofore cited by us in our brief on this third oral argument (p. 81), to wit, *Reynolds vs. United States* (1878), 98 U. S. 145, that this work is quoted (at p. 155) by *Mr. Chief Justice Waite*. Their criticism of Gabbet (their brief, p. 10), is, that he uses the word clandestine before the word "bringing." This critcism does not in any way affect the question, because for the purpose of the argument it is unimportant whether smuggling means *clandestinely* bringing on shore or *openly* bringing on shore.

Anderson's Law Dicticnary is also cited (their brief, p. 13). William C. Anderson gave his law dictionary to the world in the year 1889. Under the title "Smuggling" he gives the

definition contained in the interpreting clause in the proviso to Section 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186; 1 Sup. Rev. Stat., 77). To cite Anderson is begging the question, because he cites and quotes the Anti-moiety Act, which gives a definition of smuggling "*for the purposes of this act.*" (Our brief, pp. 28–37.) Anderson also states that smuggling implies something illegal and is inconsistent with an innocent intent, and conveys the idea of a secret introduction of goods with intent to avoid payment of the duty, and cites in support thereof "*United States vs. Claflin* (13 Blatch., 184, 175, *Benedict, J.; Stockwell vs. United States*, 13 Wall., 546 (1871)." The sum and substance is, that Anderson merely referred to the Anti-moiety Act, and gives the definition for the purpose of that act. This merely supports our contention, that the same word in different acts of Congress may have a different meaning in each act. (Our brief, pp. 28–31.)

Abbott's Law Dictionary is also referred to. Benjamin Vaughan Abbott first gave his work to the world in 1879. His definitions are practically based on the Anti-moiety Act of June 22, 1874 (18 Stat., 186), and *United States vs. Claflin* (13 Blatch., 178), and the same comment is applicable to this as was made on Anderson.

In another case cited, it appears that one Gates was indicted for a violation of Section 19, of the Act of August 30, 1842 (5 Stat., 548, 565), pleaded guilty thereto and suffered fine and imprisonment. A suit was then filed by the United States against him in *United States vs. Gates* (1845), 2 N. Y., Leg. Obs. 8; 8 Law Rep., 465; 25 Federal Cases No. 15, 191, p. 1263, for a penalty under Section 50 of the Act of March 2, 1799 (1 Stat., 627, 665). *Mr. District Judge Betts* necessarily implies that bringing on shore is a part of the crime of smuggling when he says that the—

"Question raised by the demurrer in this case is substantially whether a person convicted and punished by fine and imprisonment for *smuggling goods on shore* in this port (*thus*

landing them without a permit) is liable also to an action for $400 penalty for such landing."

Another authority referred to is Jacob's Law Dictionary. An examination of that compilation fails to disclose the word "smuggle" or the word "smuggling." In Vol. 2, Jacob's Law Dictionary (Ed. by E. T. Tomlins, London, 1797), title "Smugglers," we find the following, to wit:

"*Smugglers.*" Those persons who conceal prohibited goods and defraud the King of his customs on the sea coast by importing goods without paying the duties imposed by the laws of customs and excise. See these titles, particularly the first."

An examination of the titles referred to throw no light on the question, and do not define the words "smuggle" or "smuggling." Jacob cites no authority, and is not a commentary or treatise upon the law, and his book is purely a dictionary. Even the title "Smugglers" is not strictly a definition. Mill's Logic (Ed. Harper & Bro., 1888), Chapter 8. Jacob's definition of a smuggler is not, properly speaking, a legal definition of even the word smuggler, because it no more describes a smuggler than other well-known violators of the revenue laws who are not in a legal sense smugglers.

Jacob does not say where the goods are concealed unless when he says "on the sea coast." If they be concealed on the sea coast the word would seem to imply that they were brought on shore. If Jacob means anything else than what he says, it is inconsistent with the law writings and commentaries of his contemporaries and those who went before and after him. He seems to use the word, not in the legal technical sense to define the crime of smuggling. It is a very common thing for a law-writer to use a word as conveniently covering the whole subject, and thereafter in his treatise to apply that word accurately to a part of the subject embraced under the general title. The title in Bacon's Abridgement is "Smuggling." Under that title he divides up his subject and defines

the crime of smuggling, and then defines a great number of other crimes which are not smuggling, but are other offenses against the revenue. This is very clear from a quotation we have already made (our brief, p. 27) from 6 Bacon's Abridgement (5th Ed.) 286; 7 Bacon's Abridgement (7th Ed.) 354; 9 Bacon's Abridgement (Amer. Ed., 1876, by Bouvier) 140, to wit:

"As the offense of smuggling is not complete unless some goods, wares or merchandise are actually brought on shore, or carried from shore contrary to law, *a person may be guilty of divers practices which have a direct tendency thereto, without being guilty of the offense.*"

And this is seen in works on various branches of the law. A work entitled "Law of Trade-marks" treats of trade-marks and unfair competition. Such a work defines a trade-mark and gives examples of trade-marks, and then devotes the major portion of the work to cases on unfair competition in business, and is careful to state that they are not trade-mark cases. There is no doubt but that Giles Jacob was a prodigious and diligent compiler, but he does not rank as a commentator with Gilbert, Bacon, Hawkins, and Russell, or even Gabbot. Giles Jacob was noted as having written "Poetical Register, or Lives and Characters of the English Dramatic Poets," "Love in the Wood," "Soldier's Last Stake," "Human Happiness," "Journey to Bath and Bristol," "Essay on Life," "Essay on Criticism," and others—prose, poetry, and playwrights.

The learned counsel for the United States, defendant in error, cite (their brief, p. 14) H. J. Stephen's Summary of the Criminal Law, 89. This is inaccessible to us, but as stated in their brief (p. 14), Stephen relied, for his authority, upon Russell. Russell defines smuggling as already given (our brief, p. 10). Warren's Law Studies (2d. Ed., 1845) 620, says that Russell is "the best general treatise on criminal law." The same writer, in speaking of other authorities states that

Mr. Sergeant Hawkins' Pleas of the Crown is "of great authority with the courts." Not having Stephen's Summary of the Criminal Law before us neither can we determine in what sense he uses the words "import" or "export."

Bell's Dictionary of the Law of Scotland, and Hume's Commentaries on the Law of Scotland are also cited (their brief, p. 14), and not being accessible we do not know what weight is to be given Scotch Dictionaries and Commentaries on Scotch Law, when the English law writers uniformly give a different definition of smuggling, nor do we know in what sense Bell or Hume use the words "import" or "export." It is now admitted by the learned counsel for the United States, defendant in error (their brief, p. 15), that "*no reference has been found in any of the Scotch or Irish Authorities [cited by them] to the common-law crime of smuggling.*"

The mere assertion on the part of the learned counsel for the United States, defendant in error, cannot sweep away or render obsolete Hawkins, Gilbert, Bacon, Russell, and Gabbet, which have appeared in numerous editions between the years 1716 and 1896, both inclusive (our brief, pp. 9–12), a period of over one hundred and eighty (180) years.

(*c.*) *The common law or legal meaning of the word applies.*

It is now for the first time contended (their brief, p. 13) that the word smuggle shall be given its mere etymological or popular meaning, and not its legal meaning. To do so would be to overrule all of the authorities (our brief, pp. 8–15), and *Dunbar vs. United States* (1895), 156 U. S., 185. In this case *Mr. Justice Brewer* turned to a law book to ascertain the meaning of the word smuggle, and that law book was Vol. 2, Bouvier's Law Dict., p. 528, which in turn cited another law book, to wit, Bacon's Abridgement, and one of the editions of same was under the editorship of the same Bouvier who defines smuggling as we have heretofore set out (our brief, p. 11). In the case of the *United States vs. Claflin* (1875), 13

Blatch, 178, mostly relied upon by the learned counsel for the United States, defendant in error, *Mr. District Judge Benedict*, said (at p. 184) that :

"The word 'smuggle' is a technical word having a known and accepted meaning."

In addition to the other authorities already referred to by us (our brief, pp. 13–15), we desire to add Bacon's Abridgement (5th Ed., 1798), 383, to wit:

"If a statute make use of a word, the meaning of which is well known at the common law, the word shall be understood *in the same sense it was understood at the common law.*"

To accept the suggestion of the learned counsel for the United States, defendant in error, would be to upset the uniform holdings of this court from 1818 to 1898, and overrule the cases of *United States vs. Palmer* (1818), 3 Wheaton, 610, 630, 636, 640; *United States vs. Smith* (1820), 5 Wheaton, 153, 159–160; *Swearinger vs. United States* (1896), 161 U. S., 446, 451; *Moore vs. United States* (1875), 91 U. S., 270, 274; *Smith vs. Alabama* (1887), 124 U. S., 465, 478–479; *United States vs. Wong Kim Ark* (1898), 169 U. S., 649, 653–654, 654, 655, 662, 679–680, 707 (our brief, pp. 12–15). *In Rice vs. Railroad Company* (1861), 1 Black, 358, *Mr. Justice Clifford* said (pp. 374–375), that:

"In the construction of the laws of Congress the rules of the common law furnish the true guide."

In *Miles vs. Williams* (1714), 1 Peere Williams, 219, *Lord Chief Justice Parker* said (p. 252) that:

"The best rule of construing acts of Parliament is by the *common law.*"

The learned counsel for the United States, defendant in error, are inconsistent, for in another part of their brief (p. 12) they use this language:

"The *ordinary legal meaning* of the verb 'to smuggle' should be accepted in defining what is meant by the crime."

The frequent enactment in England (their brief, pp. 20–22) of statutes making acts criminal other than the recognized common-law crime of smuggling, shows that the word smuggle had a well recognized legal meaning and covered a subject on which it was unnecessary to legislate, but that it did not cover numerous other acts preceding and following smuggling, and which it was desirable to make criminal. The same can be said of the American legislation (their brief, pp. 23–27). When Congress, on August 30, 1842 (5 Stat., 548, 565, Sec. 19), punished smuggling, it provided for a punishment of that which before was not punishable in America and which of itself as common law had no force, but became of force August 30, 1842, *because Congress made that common law a Federal Statute, and it derived its force and effect from the statute.*

Mr. Justice Storey said in *United States vs. Smith* (1820), 5 Wheaton, 153, 160:

"The crime is not less clearly ascertained than it would be by using the *definitions of these terms as they are found in our treatises of the common law.* In fact, by such a reference, the definitions are necessarily included, *as much as if they stood in the text of the Act.*"

(*e.*) *Non-legal definition of smuggling.*

The learned counsel for the United States, defendant in error, cite (their brief, pp. 10–12) Johnson, Webster, Encyclopædic Dictionary, Imperial Dictionary, Century Dictionary, Worcester, Encyclopædia Brittanica, McCullough's Commercial Dictionary, Standard Dictionary, Stormouth and Penny Enclyclopædia. These compilations do not sustain the position that in law the word smuggle means something different than that laid down by Hawkins, Russell, Galbot, Bacon, and Gilbert, but on the contrary, when carefully considered, sustain our position.

Webster, Worcester, Century, Standard, and Johnson in effect define "smuggling" as importing or exporting *prohibited* goods or *dutiable* goods without paying the duty. It is conceded by the learned counsel for the United States that this is an ordinary and popular definition of smuggling and not a legal definition. The words "import" and "export" are, therefore, used in an ordinary or popular, and not a legal sense. In a legal sense the word "import" means bringing into a port with intent to land (our brief, pp. 44–46). If Webster, Worcester, Century, Standard, and Johnson used the word "import" in a legal sense, then a different question might be presented. These dictionaries bear internal evidence that their compilers do not use the word "import" in a legal, but in an ordinary or popular sense. In Webster's Dictionary (1890) the following is found (p. 737), to wit:

"*Im-port'* (im-pōrt') v. t. [imp. p. p. Imported; p. pr. & ob. n. Importing] [L. *importare* to bring in, to occasion, to cause, pref im. in + *portare*, to bear. Sense 3 comes through F. *importer* from the Latin. See Post demeanor].

"1. To bring in from abroad, to introduce from without; especially, to bring (wares or merchandise) into a place or country from a foreign country, in the transactions of commerce;—opposed to *export*. We *import* teas from China, coffee from Brazil, etc.

"*Import* (im-port), n. 1. Merchandise imported brought into a country from without its boundaries—generally in the plural, opposed to *exports*.

"I take the *imports* from, and not the exports to, these conquests, as the measure of these advantages which we derived from them.—Burke."

In Webster's Dictionary (1890), the following is found (p. 529), to wit:

"*Export'* (ĕks-pōrt') v. t. [imp. and p. p. Exported; p. pr. and vb. n. Exporting]. [L. exportare, exportateau; ex, out, and portare, to carry; c. f. exporter. See Port demeaner].

"2. To carry or send abroad, or ou of a country, especially to foreign countries as merchandis r commodities in the way of commerce. The opposite nport; as to *export* grain, cotton, cattle, goods, etc.

"*Ex'pōrt* (ĕkspōrt), n. 1. The act of exporting, exportation; as, to prohibit the *export* of wheat or tobacco.

"2. That which is exported, a commodity conveyed from one country or state to another in the way of traffic;—used chiefly in the plural, exports.

"The ordinary exchange . . . between two places must likewise be an indication of the ordinay course of their *exports* and imports.—A. Smith."

In Worcester's Dictionary (1884), the following is found (p. 725), to wit:

"*Import* (114), v. a. [L. importo; *im* in, and porto, to bear; It. *importare*; Sp. importar, Fr. importer]. [i. imported, p. p. importing, imported].

1. To bring or carry into a country from abroad; opposed to export.

Import (114), [im'port—S. W. P. T. E. F. H. Sm. R. Wr. impōrt,' Ju], n.

3. "Anything brought from abroad or imported; merchandise imported; opposed to *export*. Our imports ought not exceed our exports.—Johnson. Syn. See signification."

In Worcester's Dictionary (1884) the following is found (p. 522), to wit:

"*Export*, v. a. [L. exporto, to carry from or away, ex from, and *porto*, to carry; It. esportare; Sp. exportur; Fr. exporter.] [i, exported; pp, exporting, exported]. To carry or send out of a country, as merchandise.— Addison.

"*Export*, n. A commodity carried to a foreign market; that which is exported. Schedules containing an account of the imports and exports.—Bp. Berkeley."

In the Century Dictionary (1889) the following is found (Vol. III, p. 3013), to wit:

"*Import* (im-pōrt') v. [OF, emporter, importer, carry, F. emporter, carry away, prevail, importer, import, matter, signify; also, more recently, in the lit. sense of the L. introduce, import;=Sp. Pg., importar;=It., importare, signify, express [L. importare, importare, bring in, introduce from abroad, bring about, occasion, cause] in, in × portare, carry; see part 3, Cf., export, etc.] I. trans. 1. To bring from without; introduce from abroad; especially to bring from a foreign country, or from another State, into one's own country or State opposed to export; as to import wares and merchandise.

"Others *import* yet nobler arts from France,
Teach kings to fiddle, and make senates dance.
—Pope, Dumiad, IV, 596.

"From Greece they [the Latins] derived the measures of their poetry, and, indeed, all of poetry that can be *imported.*
—Macaulay History.

"Wheat and corn are extensively *imported* into Cork.
—Encyc. Brit., VI, 406.

"*Import* (im′pōrt), n. [OF, emport, a carrying away, influence, favor, importance; from the verb; see import, v.]

"1. That which is imported or brought from without or from abroad; especially merchandise brought into one country from another; usually in the plural; opposed to export.

"I take the imports from, and not the exports to, these conquests, as the measure of these advantages which we derived from them.—Burke, Late State of the Nation."

In the Century Dictionary (1889), the following is found (Vol. II, p. 2084), to wit:

"*Export* (eks-pōrt′), v. t. [=F. exporter=Sp. exportar=D. exporteren=G. exportiren=Dan. exportere=Sw. exportera [L. exportare, carry out, carry away [ex, out, + partare, carry, bear, see port.]

"Specifically—2. To send to a distant point, as commodities, send for sale or exchange to other countries or places.

The liberty of exporting wool had . . . been cut down before the English manufacturers were able to take up the home supply.—Ency. Brit., VI, 410.

"*Export* (ĕks-port), n. [=D. Dan. Sw. export; from the verb] 1. The act of exporting; exportation: as, to prohibit the *export* of grain.

"An efficient patrol of the sea by armed cruisers would stop the importation of food and the export of commodities in a week.—The Engineer, L. XV, 407.

"2. That which is exported; a commodity carried from one place or country to another for sale; generally in the plural.

The ordinary course of exchange between two places must likewise be an indication of the course of their exports and imports.—Adam Smith, Wealth of Nations, IV, 3.

"The amount of *exports* for 1883 being, according to the treasury estimate, no less than ninety millions of dollars.
—D. Webster, Senate, March 18, 1834."

In the Standard Dictionary (1874), the following is found (Vol 1, p. 902), to wit :

"*Import*, im-pōrt, v. 1. To bring from a foreign country or state into one's own country or state ; introduce from abroad, especially commercially ; opposed to export ; as, to *import* woolen goods ; to *import* labor.

"*Import*, im'port, n. 2. That which is imported from one country into another ; mostly in the plural ; as, our *imports* fall short of our exports."

In Johnson's Dictionary (1818), the following is found (Vol. 3), to wit :

"*To Import*, v. a. [Importo, Lat].

1. To carry into any country from abroad ; opposed to export.

" For Ellis I would sail with intenst speed,
To *import* twelve mares, which there luxurious feed."
Pope.

"*Import*, n. s. [from the verb. Formerly the accent was constant on the last syllable of this word ; in modern times, frequently on the first syllable, and certainly always so in the third meaning.]"

In Johnson's Dictionary (1818), the following is found (Vol. 2), to wit :

"*To Export*, v. a. [*exporto*, Latin]. To carry out of a country, generally in the way of traffick.

"Edward III, by his encouragement of trade, turned the scale so much in favor of English merchandise that, by a balance of trade taken in his time, the *exported* commodities amounted to two hundred and ninety-four thousand pounds, and the imported but to thirty-eight thousand.—*Addison, Freeholder.*

"Great ships brought from India precious wood and *exported* pearls and robes.—*Abuthnot on Coins.*"

"*Export n. s.* [from the verb]. Commodity carried out in traffic.

"Whether there should not be published, yearly, schedules of our trade, containing an occount of the imports and *exports* of the year ?—*Bp. Berkeley, Querist*, 179."

Giving the word "import," in the definition of smuggling, its ordinary and popular meaning, the argument of the

learned counsel for the United States, defendant in error, fails.

McCullough's Dictionary, Stormouth, and the Penny Cyclopedia do not bear out the contentions of the learned counsel for the United States, defendant in error.

In McCullough's Dictionary of Commerce and Commercial Navigation (1875), the following is found:

"*Smuggling*. The offense of importing *prohibited* articles, or of defrauding the revenue by the *introduction* of articles into consumption, without paying the duties chargeable upon them. It may be committed indifferently either upon the excise or customs revenue."

In the Dictionary of the English Language (1885), by the Rev. James Stormouth, revised by the Rev. P. N. Phelp, the following is found:

"*Smuggle*, v. smug'gl. [Dan., smugle; Ger., schmuggeln; Dut., smokkelen, to smuggle; O S., smugan, to creep; Icel, smuygja, to slip into], to bring goods into or carry goods out of a country secretly in order to escape payment of the legal duties; to convey clandestinely; smuggling, inp-gling; n., the offense of passing goods into or out of a country without paying the legal duties; the act or practice of; smuggled, pp. and a-gld; smuggler, u, gler, one who smuggles; a ship employed in smuggling."

In the Penny Cyclopedia of the Society for the Diffusion of Useful Knowledge (1841), the following is found (Vol. 22), to wit:

"Smuggling is the clandestine introduction of prohibited goods; or the illicit introduction of goods by the evasion of the legal duties."

There are many other lexicographers who give the definition contained in the legal authorities already quoted (our brief, pp. 9–12).

In Bailey's Etymological English Dictionary (1747), the following is found, to wit:

"*To smuggle* [smuckelen, Du.; schmuckelen, Teut.; smaggertz, Dan.] to *run goods ashore, or bring them in by stealth.*"

In Bailly's Dictionarium Brittannicum (1780), the following is found:

"*To smuggle* (smukelen, Du.). *To run goods ashore, or bring them on shore by stealth without paying the customs.*"

In Bailey's English Dictionary (London, 25th Edition, 1783) the following is found:

"*To smuggle* [smeeckele, Belg.; schmeichelen, to fawn and flatter, Teut.; smaggerer, Dan.], *to run goods ashore or bring them in by stealth.*"

In Bailey's English Dictionary (25th Edition, enlarged and carefully corrected by Edward Hardwood, D. D., 1790), the following is found:

"*To smu'ggle* [smeeckle, Belg.; schmeichelen, to fawn and flatter, Teut.; smaggerer, Dan.], *to run goods ashore or bring them in by stealth.*"

In a New General English Dictionary by Rev. Mr. Thomas Dyche and finished by William Pardon Gent (1787) the following is found:

"*Smu'ggle* (v.), to run goods out of a ship clandestinely, without paying the duty the government has appointed.
"*Smu'ggler* (s.), one who makes a trade of carrying or exporting *prohibited* goods out of, and bringing such into, a nation; and also *that brings goods ashore and from aboard a ship, that are* ALLOWED, *without paying the duties or customs appointed.*"

In the New World of Words or Universal English Dictionary, by Edward Phillips, revised by J. N. Philobibl (1770), the following is found:

"To smuggle goods, *to run them ashore, or bring them in by stealth without paying the custom.*"

The Encyclopædia Britannica uses the word as a general one to denote all kinds of crimes against the revenue, and

deals exclusively with statutory crimes. This is apparent (9th Ed., 1887, Vol. 22, p. 185) where the writer of the article says that:

"The penalty for smuggling in the United States will be found mainly in title XXXIV, Ch. 10, of the Revised Statutes."

We have already had occasion to comment on this (*ante*, pp. 9–10).

The Encyclopædic Dictionary and the Imperial Dictionary, cited by the learned counsel for the United States, defendant in error, are not accessible to the writers of this brief, and, therefore, cannot be commented on.

II.

The Definition in the Anti-Moiety Act Does Not Apply.

(1.) The construction of a Federal Statute cannot be regarded as settled until adjudicated by the Supreme Court of the United States.—*Post p. 21.*

(2.) Courts are not at liberty in construing an act of Congress to recur to the views of individual members in debate, nor to consider the motives which influence them to vote for or against its passage. The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of the legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might have differed from each other. A law, as it is passed, is the will of the majority of both houses, and the proper way to interpret or construe a legislative act is from the language used in the act.—*Post pp. 21-26.*

(3.) The words "for the purposes of this act," in Sec. 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), are plain and unambiguous, and cannot be stricken out by resorting to the individual opinions of members of Congress. And even if such resort be had, nothing was said by them which will justify the Court in striking them out.—*Post pp. 26-27.*

(4.) Courts may, when an ambiguity exists in a statute, look to the public history of the times in which it is passed to solve the ambiguity. If a case be not within the language of a criminal statute, it cannot be held to be within the statute, although a resort to the debates in Congress or the history of the times may show that it was the intention of Congress to include it within the statute. There are no constructive crimes.—*Post pp. 24-26.*

(5.) The same rules as set forth in the above four paragraphs apply to administrative practice. The administrative practice under this act throws no light on the question.—*Post p. 27.*

(*a.*) *Dictum in the Claflin Case.*

What was said by *Mr. District Judge Benedict* in the *Claflin Case* was *obiter dictum.* (Our brief, pp. 34–37.) Even if it had been a decision on a question properly before the Court, it would not be binding. *Mr. Justice Blatchford* said (in reference to a decision by a *nisi prius* court in a patent case) in *Andrews vs. Hovey* (1888), 124 U. S., 694, 716, that —

"A question arising in regard to the *construction of a statute of the United States* concerning patents for inventions *can not be regarded as judicially settled when it has not been so settled by the highest judicial authority* which can pass upon the question."

(*b.*) *Debates in Congress.*

It is now contended by the learned counsel for the United States, defendant in error, that the words "for the purposes

of this act" may be struck out because of the debate on the Anti-Moiety Act. From the parts of the debate quoted (their brief, pp. 44–47), no reference is made to Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Rev. Stat., and even if there had been the words "for the purposes of this act," can not be eliminated even though individual members of Congress had stated to the contrary. The words "for the purposes of this act" are plain, unambiguous words, were inserted in the statute, and can not be denied their full meaning. This court has repeatedly laid down the rule that it is unsafe to resort to the debates in Congress to raise a doubt as to the meaning of words, and resolve that doubt by substituting the language of senators and representatives used in debate for the language used in the Congressional enactment. *Aldridge vs. Williams* (1845), 3 Howard, 9, 24; *United States vs. Missouri Pacific R. R. Co.* (1875), 91 U. S., 72, 79; *United States vs. Freight Association* (1897), 166 U. S., 290, 318.

In *Aldridge vs. Williams* (1845), 3 Howard, 9, *Mr. Chief Justice Taney*, said (p. 24), that:

"In expounding this law, the judgment of the court can not, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the Act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

In *United States vs. Union Pacific R. R. Co.* (1875), 91 U. S., 72, *Mr. Justice Davis* said (p. 79), that:

"In construing an Act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influence them to vote for or against its passage. The Act itself speaks the will of

Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."

In *United States vs Freight Association* (1897), 166 U. S., 290, *Mr. Justice Peckham* said (p. 318):

"The reason is that it is impossible to determine with certainty what construction was put upon an Act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and upon occasion, by a resort to the history of the times when it was passed. (Cases cited *supra*.)"

The proviso to Sec. 4 of the Anti-moiety Act of June 22, 1874 (18 Stat., 186), was passed in the same form in which it appeared in the bill. The words "for the purposes of this act" are plain and unambiguous, and the cases of *Elk vs. Wilkins* (1884), 112 U. S., 49, 112–114, and *United States vs. Wong Kim Ark* (1898), 169 U. S., 649, 682, 697, cited by the learned counsel for the United States, defendant in error, in no way conflict with the cases already cited by us (*supra*, pp. 22–23).

In *Elk vs. Wilkins* (1884), 112 U. S., 94, Elk, an Indian, sued Wilkins, a registrar of elections, for refusing to register Elk as an elector. The question was, whether Elk was a citizen of the United States. The opinion of the Court was delivered by *Mr. Justice Gray*, and the page references in the brief of the learned counsel for United States, defendant in error, are to the dissenting opinion of *Mr. Justice Harlan*. The dissenting opinion does not sustain the position for which it is quoted, because the learned Justice makes the references for the purpose of showing the legislative amendments in the bill which became the Act of April 9, 1856 (14 Stat., 27), which preceded the adoption of the Fourteenth Amendment.

In *United States vs. Wong Kim Ark* (1898), 169 U. S., 649, *Mr. Justice Gray* refers (pp. 681-682) to *Elk vs. Wilkins*, and instead of sustaining the position of the learned counsel for the United States distinctly states (at p. 699) that:

"Doubtless *the intention* of the Congress which framed and of the States which adopted this amendment of the Constitution *must be sought in the words of the amendment; and the debates in Congress are not admissible as evidence to control the meaning of those words.* But the statements above quoted are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves; and are at the least interesting as showing that the application of the amendment to the Chinese race was considered and not overlooked."

In the case at bar no such legislative history appears, and the debates in Congress when examined destroy rather than sustain the position of the learned counsel for the United States, defendant in error.

We will now take up the other authorities cited by the learned counsel for the United States, defendant in error (their brief, p. 45).

In *Spencer vs. State* (1854), 5 Ind., 41, 49, *Mr. Justice Perkins*, after stating the ancient custom of judges going to the legislature and asking its members what they meant, states the modern practice (p. 49) as follows, to wit:

"But the practice has not been revived and we now go not to the legislature, but to the language of the statutes they enact for the public and governed by certain established and binding rules of construction, we, from that, declare the legislative intention. * * * * There is no necessity, therefore, for us to inquire whether the legislature, or the members of it, really personally did mean that a later statute, totally repugnant to a former, should repeal such former statute or not * * * * That body is estopped by its language."

In *American Net and Twine Co. vs. Worthington* (1891), 141 U. S., 468, *Mr. Justice Brown* (p. 474), resolved a doubt in a tariff law in favor of an importer. He stated (pp. 473-474) that:

"While *the statements made and the opinions advanced by the promotors of the act in the legislative body are inadmissible as bearing upon its construction*, yet reference to the proceedings of such body may properly be made to inform the Court of the exigencies of the fishing interest and the reasons for fixing the duty at this amount."

Tariff laws, like criminal statutes, are to be strictly construed, and in the case cited this Court did not impose a duty not within the language of the Tariff Act by resorting to debates in Congress, but relieved the importer from a duty by considering the exigencies of the fishing interests and the reasons for fixing a specific duty on a specific article.

In *Holy Trinity Church vs. United States* (1892), 143 U. S., 457, *Mr. Justice Brewer*, in construing the contract labor law, a criminal statute, exempted a case in favor of the accused, although within the language of the statute, but did not include a case not within the language of a statute by a reference even to the history of the time or the history of the bill in the legislative body.

In *Texas and Pacific Ry. Co. vs. Interstate Commerce Commission* (1895), 162 U. S., 197, 218, merely held that the law creating the Interstate Commission was experimental, and that the court could look at the history of the legislation. This resulted in a decision in favor of the Railway Company.

United States vs. Laws (1896), 163 U. S., 258, 262, also construed the contract labor laws. *Mr. Justice Peckham* merely stated that the courts might resort to a history of the times to exclude a case which was within the language of a statute, but it did not hold that a criminal statute could be extended by construction to a case not within the language of a statute, because of the history of the times.

None of the authorities cited have any bearing upon the Anti-moiety Act, and especially no bearing upon the interpreting clause, as contained in section 4 of that statute.

There is nothing shown in "the history of the times" which would cause this court to strike out the words "for the

purposes of this act." And even if we consult the debate, there is nothing to bear out the contentions of the learned counsel for United States, defendant in error. The Anti-moiety Bill, H. R. No. 3171, contained the same interpretating clause as finally passed and was reported May 19, 1874, by Mr. Ellis H. Roberts, M. P., from the Committee on Ways and Means (Congressional Record, 43d Congress, 1st Session, Vol. 2, Part v, page 4026). The debates may be found recorded between pages 4026–4052; 4718–4732; 4801–4829. These were not debates on the Act of August 30, 1842, but debates on the Bill which became the Act of June 22, 1874 (18 Stat., 186). Even if it were proper to resort to the debates, no light is thrown upon the question. We take the following from the debate (p. 4026), to wit:

"MR. CONKLING.—* * * * I pass on to the eighth line. *Provided*—Now comes a definition of smuggling, as the Senator from Ohio nearest me explained, to take the place of all the present definitions of smuggling.

"MR. SHERMAN.—*No. I beg pardon.*

"MR. CONKLING.—Well, of the *two* definitions. Are there more than two?

"MR. SHERMAN—I said expressly on the contrary, that this did not affect in the slightest degree the action against smuggling, but it says expressly, '*Provided*, That for the purposes of this act.' That is, for the purposes of obtaining compensation for this service.

"MR. CONKLING.—If my honorable friend will bear with me for a moment he will see that he is only anticipating me. *Of course, it is 'for the purposes of this act.'* . . I am coming to that. But first, did he not tell us that for the purposes of this act this definition of smuggling was intended to take the place of the now prevailing definition? Certainly he did, and he will not have told us that, because we all know that that will be the effect of it.

"MR. SHERMAN.—Does the Senator now think that this act, or any word in it, repeals the laws against smuggling?

"MR. CONKLING.—If my friend will pardon me for a moment he will find out what I think. Had the Senator said 'that for the purposes of this section' that should be the law, there would be a place for his argument to rest upon at least as large as the sole of a dove's foot; but as it is now, there is nothing, absolutely nothing, for the argument to rest on, as I think I can show. Let me see.

"*Provided*, That for the purposes of this act—
"That means every part of *this act*, does it not? *My friend nods assent to that.*"

(*d.*) *Administrative practice.*

The restrictive words "*for the purposes of this act*" are plain and umambiguous. If it be argued that resort may be had to administrative practice to strike them out the answer is, that similar contentions have been uniformly overruled by this Court. *Edwards vs. Darby* (1827), 12 Wheaton, 206–210; *United States vs. Temple* (1881), 105 U. S., 97, 99; *Swift vs. United States* (1881), 105 U. S., 691, 694–695; *United States vs. Graham* (1884), 110 U. S., 219, 221; *United States vs. Trainer* (1893), 147 U. S., 661, 663; *United States vs. Alger* (1894), 152 U. S., 384, 397. And even if it were proper to resort to claimed administrative practice as written in the opinion of *Mr. Acting Attorney-General Phillips* in the year 1884 contained in 18 Opinions of the Attorney General, 60, and communications of Feb. 26, March 19, and April 14, 1896, of *Mr. Comptroller of the Treasury Bowler* in 2 Decisions Comptroller of the Currency, 420, 458, and 491, we find nothing therein throwing light on this question.

III.

Clandestinely Introduce.

(1.) **The words "clandestinely introduce" contained in Section 19 of the Act of Aug. 30, 1842 (5 Stat., 548, 365), now Sec. 2865, Rev. Stat., do not create a distinct offense. Said Section 19 created but two crimes, the first "smuggling," and the second, passing goods through the custom-house by means of false, forged, or fraudulent invoices. *United States vs. Sixty-seven Packages of Dry Goods* (1854), 17 Howard, 85, 93.—*Post pp. 28-29.***

(2.) If the words "clandestinely introduce" constitute a distinct offense, the crime is not properly charged.—*Post p. 29.*

(3.) If the words "clandestinely introduce" constitute a distinct offense, the facts do not make out an offense.—*Post p. 29.*

(4.) If the words "clandestinely introduce" constitute a distinct offense, it was error for the court to charge the jury, that if they found the defendant guilty of "smuggling," to find him guilty generally.—*Post p. 30.*

In the brief of the learned counsel for the United States, defendant in error (p. 39 and p. 65), the assertion is made, without arguing it, that the words "clandestinely introduce" contained in Section 19, Act of Aug. 30, 1842 (5 Stat., 548, 565), now Sec. 2865 Rev. Stat., created a distinct offense.

(*a.*) *These words do not create a distinct offense.*

We have given a history of this section in our brief (pp. 6–8), and have in this brief given some additional authorities bearing thereon (*ante* pp. 2–4). This assertion is disposed of by *Mr. Justice Nelson* in *United States vs. Sixty-seven Packages of Dry-goods* (1854), 17 Howard, 85, wherein he stated that this section created *two* crimes and *not* three crimes, as follows (p. 93), to wit:

"*It first makes the smuggling of dutiable goods into the country a misdemeanor;* and, secondly, the passing or attempting to pass them through the custom-house, with intent to defraud the revenue, by means of false, forged, or fraudulent invoices; the latter is an attempt which, in effect and result, is very much akin to that of smuggling, except done under color of conformity to the law and regulations of the customs."

It therefore follows that the second count of the indictment covers only the crime of smuggling, and not a distinct offense of clandestinely introducing.

A somewhat similar matter was presented in *Swearingen vs. United States* (1896), 161 U. S., 446. In this case defendant was indicted for a violation of the Rev. Stat., Section 3893, which enacts that "that every obscene, lewd *or* lascivious book . . . are hereby declared to be non-mailable matter," etc. The indictment alleged that the newspaper article in question "was obscene, lewd, *and* lascivious." It was urged that the indictment was bad for duplicity, but *Mr. Justice Shiras* said (at p. 450):

"If each adjective in the statute described a distinct offense, then these counts would be bad for duplicity, and the defendant's motion in arrest of judgment for that reason ought to have been sustained. We, however, prefer to regard the words, "obscene, lewd, or lascivious," used in the statute as describing one and the same offense. That was evidently the view of the pleader and of the court below, and we think this is an admissible construction."

Mr. Justice Shiras and the concurring justices sustained the indictment, but reversed the judgment upon other grounds. Therefore, the learned justices who dissented from the reversal concurred in that part of the opinion quoted.

(*b.*) *If the words "clandestinely introduce" constitute a distinct offense the crime is not properly charged.*

We have already discussed this question in the Revised Brief, pp. 51–56, and the argument will not be repeated.

(*c.*) *If the words "clandestinely introduce" constitute a distinct offense, the facts do not make out an offense.*

We have already discussed this question in the Revised Brief, pages 72 to 75, and the argument will not be repeated. The argument made in our brief as to the crime of smuggling is also applicable (our brief, pp. 25–28).

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(*d.*) *If the words "clandestinely introduce" constitute a distinct offense, it was error for the Court to charge the jury, that if they found the defendant guilty of smuggling, to find him guilty generally.*

We have already discussed this question in the Revised Brief, page 75, and the argument will not be repeated.

IV.

First Count of Indictment.

(1.) The first count of the indictment was fatally defective and a demurrer thereto ought to have been sustained. —*Post pp. 30-31.*

(2.) Importing contrary to law covers only prohibited goods.—*Post p. 31.*

(3.) The facts do not make out a case of importing contrary to law.—*Post p. 32.*

(4.) Full force and effect must be given all sections of the Statutes of the United States.—*Post p. 32.*

(5.) Plaintiff in error, Mr. Herman Keck, was found not guilty of the charge of importing contrary to law.— *Post pp. 32-34.*

(*a.*) *The first count of the indictment was fatally defective, and a demurrer thereto ought to have been sustained.*

This count was conceded to be defective by *Mr. Assistant Attorney-General Whitney* in his brief, filed October term, 1896, and this count was abandoned by him on the oral argument of this case during the same term. While *Mr. Assistant Attorney-General Hoyt* and *Mr. District Attorney Beck* brought out an elaborate brief, October term, 1897, in support of the first count, we understood the learned *Assistant Attorney-General* to abandon the first count on the oral argument that term.

We refer the Court to our *Reply Brief*, pages 1 to 12, dated January 19, 1898, submitted October term, 1897, and will not repeat the argument there made.

(*b.*) *Importing contrary to law covers only prohibited goods.*

In *United States vs. Thomas* (1870), 4 Benedict, 370, it was held that the expression "imported contrary to law" comprehended the importation of prohibited goods and the importation of goods in particular forms or conditions, and did not cover the case of irregularities to evade the payment of duties.

In *United States vs. Ninety-Five Boxes* (1874), 19 Int. Rev. Rec., 101; 27 Federal Cases, 171, it was held that this statute applied only to the importation of prohibited goods and importation of goods in particular forms or conditions.

In *United States vs. Nine Trunks* (1887), 22 Int. Rev. Rec., 317; 27 Federal Cases, 161, the trial judge came to the same conclusion. And as stated by the learned counsel for the United States, defendant in error, *United States vs. Claflin*, 13 Blatch., 178, supports the same view (their brief, p. 8).

The decisions of the District Courts in the cases of *United States vs. Thomas*, *United States vs. Ninety-Five Boxes*, *United States vs. Claflin*, and *United States vs. Nine Trunks* were but the application of the rule that criminal statute must be strictly construed, and cannot be extended by implication to cases not falling within their terms (our brief, pp. 21–25). The last case cited (a forfeiture case) went on error to the Circuit Court. *Mr. Circuit Justice Strong* held that this statute should be liberally construed, and could be extended to cases not falling within its terms. Witht his premiss the conclusion he reached is sound, *but he seems to have forgotten*, and failed to apply, the opinion delivered by him in *Stockwell vs. United States* (1871), 13 Wall, 531, 551–552, where he says that:

"*The act of 1866 is strictly penal, not at all remedial.*"

(*c.*) *Facts do not make out a case of importing contrary to law.*

If Sec. 4 of the Act of July 14, 1866 (14 Stat., 178, 179), now Sec. 3082, Rev. Stat., covers only the importation of prohibited goods it is clear that no crime was committed, because diamonds admissible were either as dutiable goods or on the free list (revised brief, pp. 29–31).

(*d.*) *Full force and effect must be given all sections of the statutes.*

The brief of the learned counsel for United States, defendant in error (their brief, pp. 65–68), seems to concede this, and it is no answer to use the epithets "chameleon-like," (their brief, p. 66) and "refined subtlety" (their brief, p. 68).

(*e.*) *Plaintiff in Error, Mr. Herman Keck, was found not guilty of importing contrary to law.*

The third count of the indictment was as follows (record, p. 2), to wit :

"3. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations as aforesaid, do further present that afterwards, to wit: upon the day and year aforesaid, the *said Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this Court, did knowingly, willfully, unlawfully, and fraudulently, and with intent to defraud the revenue of the United States did import and bring into the United States, to wit : into the port of Philadelphia, certain goods, wares, and merchandise, to wit : five hundred and sixty-three diamonds, of great value, to wit : of the value of ten thousand dollars, contrary to law* in that due entry was not made by the said Herman Keck of the said goods, wares, and merchandise, the said goods, wares, and merchandise being then and there clandestinely and with intent to defraud the revenue of the United States concealed by the said Herman Keck from the view and inspection of the officer of the United States duly appointed by law to examine the same, to wit: the custom house inspector, and by concealing the said goods, wares, and merchandise in a small box the said Herman Keck did not then and there particularize the contents of the said box, nor did the said

Herman Keck mention the aforesaid goods, wares, and merchandise to the said officer, which said goods, wares, and merchandise were then and there subject to duty by law and should have been then and there invoiced and entered, with intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

Plaintiff in error, Mr. Herman Keck, moved to quash this count of the indictment (record, p. 4), which the Court overruled. He then demurred to this count of the indictment (record, pp. 5–6), which the court overruled (record, p. 6).

The learned counsel for the United States, defendant in error, are clearly in error when they state that the learned trial judge held this count invalid (their brief, p. 66).

After all the evidence had been introduced, he requested the Court, among other things, to give the following charge to the jury (record, p. 109 and p. 111), to wit:

"No. 7. The jury are instructed that as the third count in each bill of indictment states that defendant, Herman Keck, imported and brought into the United States, and assisted in so doing, contrary to law, as is forbidden in Section 3082 of the Revised Statutes of the United States, in this, that he violated Section 2802 of the Revised Statutes, which prohibits a person concealing an article subject to duty in the baggage of a person arriving within the United States, which article was not, at the time of making entry for such baggage, mentioned to the collector, and the evidence in this case wholly fails to show the concealment of any article of baggage, *your verdict must be not guilty as to the third count in both bills of indictment.*"

The Court responded (record, p. 111):

"*The Court affirms the seventh point.*"

This took the third count of the indictment out of this case, and barred the United States then and thereafter from pursuing Mr. Herman Keck, plaintiff in error, on the charge of "importing contrary to law," and he could not then or

thereafter be put in jeopardy on a charge of violating Sec. 4 of the Act of July 14, 1866 (14 Stat., 178, 179), now Sec. 3082, Rev. Stat. *In re Snow* (1887), 120 U. S., 274; *Ex parte Nielson* (1889), 131 U. S., 176; *Ball vs. United States* (1896), 163 U. S., 662.

V.

ATTEMPT.

(1.) There is no statute punishing an attempt to smuggle or making an attempt to smuggle a separate offense. Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, punished two crimes, one smuggling, and the other passing or attempting to pass through the custom-house any false, forged, or fraudulent invoice.—Post p. 34-37.

(2.) The latter half of said section comprehends (a) the offense of passing goods through the custom-house by means of false, forged, or fraudulent invoices; and (b) attempting to pass goods through the custom-house by means of false, forged, or fraudulent invoices. It did not make an attempt to smuggle an offense. —Post p. 34-37.

(3.) The word "separate," in the phrase "separate offense," found in Sec. 9 of the Act of June 1, 1872 (17 Stat., 196, 198), now Sec. 1035, Rev. Stat., means distinct, separate, different, and apart; and the phrase "separate offense" means an offense distinct, separate, and apart from other offenses.—Post p. 37.

(4.) The definition in the Anti-moiety Act does not apply.—Post p. 37-38.

(5.) The facts do not constitute an attempt.—Post p. 38-39.

(6.) The facts do not constitute an attempt to smuggle, according to the testimony of Captain Loesewitz.—Post p. 40.

(7.) Plaintiff in error, Mr. Herman Keck, cannot be charged in any higher degree or to any greater extent for the acts of Captain Loesewitz than if he had done them himself.—Post p. 40.

(a.) *There is no statute punishing an attempt to smuggle* or *making an attempt to smuggle a separate offense.*

Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865 Rev. Stat., provided as follows, to wit:

SEC. 19. *And be it further enacted,* That if any person shall knowingly, and wilfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass or *attempt to pass through the custom-house any false, forged or fraudulent invoice,* every such person, his, her or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the Court."

This section created two crimes. They are thus stated by *Mr. Justice Nelson in United States vs. Sixty-seven Packages of Dry Goods* (1854), 17 Howard, 85, 93, to wit:

"*It first makes the smuggling of dutiable goods into the country a misdemeanor;* and, *secondly,* the passing or *attempting to pass them through the custom-house, with intent to defraud the revenue, by means of false, forged, or fraudulent invoices;* the latter is an attempt which, *in effect and result,* is very much *akin* to that of smuggling, except done under color of conformity to the law and regulations of the customs."

It is contended that this created a "separate offence" of attempting to smuggle (their brief, p. 53). A careful reading of the language of Sec. 19 and the language quoted from the opinion of *Mr. Justice Nelson* does not bear out the contention. This section *first* makes the *smuggling* of dutiable goods into the country a misdemeanor. It *secondly* makes the *passing or attempting to pass through the custom-house any false, forged or fraudulent invoices, a misdemeanor.* The latter comprehends (a.) the offence of *passing goods through the custom-house by means of false, forged or fraudulent invoices,*

and (*b.*) *attempting to pass goods through the custom-house by means of false, forged or fraudulent invoices.*

As further said by *Mr. Justice Nelson*, in *United States vs. Sixty-seven Packages of Dry Goods* (1854), 17 Howard, 85, 92:

"The 19th Section of the Act of 1842 subjects the party to a misdemeanor and punishable as such, concerned in making an entry, who, with intent to defraud the revenue, 'shall make out, or pass, or attempt to pass, through the custom-house, any false, forged, or fraudulent invoice.'"

The passing or attempting to pass by means of the false, forged, or fraudulent invoices is not denominated or defined as smuggling or an attempt to smuggle, but is a distinct offense other than smuggling. *Mr. Justice Nelson* speaks of the offense of passing or attempting to pass goods through the custom-house, with intent to defraud the revenue by means of false, forged, or fraudulent invoices, "as an attempt which, *in effect and result*, is very much *akin* to that of smuggling." This is a distinct assertion that it is *not* smuggling, *nor* an attempt to smuggle. *Mr. Justice Nelson* simply stated an attribute common to all offenses against the revenue which, while *akin* to each other, are yet distinct offenses. This is no authority for the assertion (their brief, p. 53) that thereby a separate offense of an attempt to smuggle was created. Section 19 created an offense of *passing through the custom-house any false, forged, or counterfeit invoice*, and of *attempting to pass through the custom-house any false, forged, or fraudulent invoice.*

The dissenting opinion of *Mr. Justice Campbell*, in *United States vs. Sixty-seven Packages of Dry Goods* (1854), 17 Howard, 85, 96, quoted by the learned counsel for the United States, defendant in error (their brief, p. 53), in no way conflicts with the opinion of *Mr. Justice Nelson* on this point, but, on the contrary, supports our contention when the isolated lines (at p. 96) are read with the context preceding and following. He speaks of the revenue being *defrauded* by passing a false, forged, or fraudulent invoice as the consummated offense,

and adds that "the attempt to defraud is punished as well as the consummate effort." After discussing the matter of an invoice and the consummate crime of passing the invoice, and attempting to pass the invoice, he further adds (at p. 96):

"*There are, besides, provisions directed against smuggling.*"

He does *not* say that there are provisions directed against an attempt to smuggle.

If, in the case at bar, a count of the *indictment* had charged Herman Keck, plaintiff in error, with having "*passed* through the custom-house a false, forged, and fraudulent invoice," and the *evidence* showed that he had *attempted* to pass through the custom-house a false, forged, or fraudulent invoice, the argument would be unanswerable that under Sec. 9 of the Act of June 1, 1872 (17 Stat., 196, 198), now Sec. 1035, Rev. Stat., Mr. Herman Keck, plaintiff in error, could be convicted of the offense of *attempting to pass through the custom-house* any false, forged, or fraudulent invoice, although the count of the indictment charged him with having *passed through the custom-house* a false, forged, or fraudulent invoice.

It is urged by the learned counsel for the United States, defendant in error (their brief, p. 52) that there is some peculiarity to be attached to the words "separate offense" found in Sec. 9, of the Act of June 1, 1872 (17 Stat., 169, 198), now Sec. 1035, Rev. Stat. There is no difficulty in these words, and in the Revised Brief and Our Brief on this, the third, oral argument and this Reply Brief, we have understood these words and used them in sense in which they are defined by lexicographers, as meaning distinct, disjoined, unconnected, disconnected, separated, disunited, not united, parted, apart from others, divided from other. Its synonym is "different."

(*b.*) *The definition in the Anti-Moiety Act does not apply.*

We have already discussed this in our brief (pp. 28–37)

and this brief (ante pp. 20–27), and the arguments will not be repeated.

(c.) *The facts do not constitute an attempt.*

We have already discussed this (our brief, pp. 54–62), and the arguments will not be repeated.

What Captain Loesewitz offered to do is but *partly* stated by the learned counsel for the United States, defendant in error (their brief, p. 68). The *full* statement has been set out by us (our brief, pp. 54–62). The epithet "dialectics" (their brief, p. 51), is no answer, and cannot brush away the evidence as embodied in the bill of exceptions as contained in the record.

Two hypotheses are presented by the learned counsel for the United States, defendant in error (their brief, pp. 19, 36, 39, 51), the *first* that Herman Keck, plaintiff in error, and Captain Loesewitz both had an intention to violate the revenue laws, and the *second* that Captain Loesewitz was merely an innocent agency. On the second hypothesis it is asserted (their brief, p. 19), that there was no *locus poenitentiae* or opportunity for repentance or opportunity for change of intention. Conceding this as a premiss, for the sake of the argument, the conclusion contended for (their brief, p. 19), does not follow. If Captain Loesewitz were the mere innocent agency of Mr. Herman Keck, plaintiff in error, the mind of Mr. Herman Keck, plaintiff in error, would furnish the intent, and the overt acts of Captain Loesewitz would be the overt acts of Mr. Herman Keck, plaintiff in error. It would therefore follow that Mr. Herman Keck would be chargeable for his criminal intention, if any, *only so far* as such intention had been *executed by overt acts* on the part of Captain Loesewitz.

The question whether Mr. Herman Keck, plaintiff in error, being on the high seas on board the steamer Aller, and Captain Loesewitz, being on board the steamer Rhynland at Philadelphia, had an opportunity to repent, or op-

ortunity to change his intention, do not correctly present the question. The question is, assuming a criminal intention for the purposes of the argument, did the *overt acts* of Captain Loesewitz constitute smuggling? Smuggling means bringing ashore (our brief, pp. 9–12). The diamonds were not brought ashore, and, therefore, there was no crime of smuggling. *United States vs. Wiltberger* (1820), 5 Wheaton, 76, 95, 95–96, 96, 105; *United States vs. Chase* (1890), 135 U. S., 255, 261; *Sarlls vs. United States* (1894), 152 U. S., 570; *Swearingen vs. United States* (1896), 161 U. S., 446, 451; *France vs. United States* (1897), 164 U. S., 676, 682–683; Our Brief, pp. 21–25, 25–28.

If the court hold contrary to our contention (our brief, pp. 28–37), that the definition contained in the interpreting clause in Section 4 of the Anti-Moiety Act of June 22, 1874, (18 Stat., 186), is to be applied to the word smuggle contained in Section 19, of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 3082, Rev. Stat., the question presented is, assuming a criminal intention for the purpose of the argument, did the *overt acts* of Captain Loesewitz constitute an attempt to smuggle? We have shown that they do not. (Our brief, pp. 54–67.)

While a few steps across a gang-plank (their brief, p. 19), would have been *overt acts* of smuggling, yet those few steps were not taken. The step from mere immorality without crime to immorality as crime, is a short one, but until that step is actually taken, no such crime is committed.

If one be charged with the crime of larceny until he takes and carries away, the *overt acts* short of taking and carrying away do not constitute larceny, whatever else they might constitute. If one be charged with smuggling, and smuggling means to take on shore, and the overt acts fall short of taking on shore, there is no crime of smuggling. The answer to the argument of the learned counsel for the United States, defendant in error (their brief, p. 20), has already been given by us (our brief, p. 83).

(*d.*) *The facts do not constitute an attempt to smuggle according to the testimony of Captain Loesewitz.*

We have already discussed this (our brief, pp. 62–67), and the argument will not be repeated.

(*e.*) *Plaintiff in error, Mr. Herman Keck, cannot be charged in any higher degree or to any greater extent for the acts of Captain Loesewitz than if he had done them himself.*

We have already discussed this (*ante* pp. 38–39), and the argument will not be repeated.

VI.

Constructive Crimes.

(1.) Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text; conclusions which are in the spirit, though not within the letter of the text.—Post p. 40-41.

(2.) There are no constructive crimes, and before an act can be held to be within a statute it must be both in the letter and spirit of the law.—Post p. 41.

(3.) History, English legislation, Federal enactments, English decisions, American precedents, analogy, allied crimes, offenses, "so to speak," non-legal definitions, and debates in Congress cannot be used to build up or construct something as a crime not within the language of a statute. An act to be within a criminal statute must be within its letter and spirit.—Post p. 40-48.

(*a.*) *Claim of United States defendant in error.*

By history (their brief, pp. 15–20), English legislation (their brief, pp. 20–22), Federal enactments (their brief, pp. 23–27), English decisions (their brief, pp. 27–29), American

precedents (their brief, pp. 29–41), analogy (their brief, p. 34, allied crimes (their brief, pp. 7, 8), offense of smuggling, "so) to speak" (their brief, pp. 18, 33), non-legal definitions (their brief, pp. 10–12), and debates in Congress (their brief, pp. 44–47), the learned counsel for the United States, defendant in error, build up, or construct a crime and call it smuggling. Construction is thus defined in Lieber's Hermeneutics (Third Ed., 1880), 44:

"Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text; conclusions which are in the spirit, though not within the letter of the text."

From 1820 to 1898, both inclusive, this court has held that there were no constructive crimes (our brief, pp. 21–25), and that before any acts could be held to constitute a crime they must be *both* within *the letter and the spirit* of the law.

(*b.*) *English Legislation.*

Magna Charta, (9 Edw. III, Ch. 23, enacted in the year 1225; 1 Stat. at Large, 9), provided that—

"All wares henceforth shall be utterly put down by Thames and Medway and through all England, *but only by the sea coast.*"

In Part 12 Coke, 34–35; Vol. 6, Coke (Lond., 1826), p. 239, it is said:

"It appeared unto us also, that at the common law no custom was paid, but only for wools, wool-pelts, and leather, which is called in *Magna Charta recta consuetudo.*"

The act of 1 Elizabeth, Ch. 11 (1558, 6 Stat. at Large, 137–142), provided in Section 2 that it should be unlawful to put from the *wharf or a place on land* into a ship; or "*to take up, discharge, and lay on land*" from a vessel wares and

merchandise, except in the day-time. Section 3 provided for a forfeiture in case of violation of Section 2. An examination of this statute does not bear out the contention for which it was cited by the learned counsel for the United States, defendant in error (their brief, p. 20).

The act of 13 and 14 Charles II, Chap. 11 (1662; 18 Stat. at Large, 78–94), also speaks of putting merchandise *on land from a ship*, and regulates the same.

The act of July 1, 1816, being 56 George III, Ch. 104 (56 Stat. at L., 526), which is not cited by the learned counsel for the United States, is entitled "an act for making more effective provision for the *prevention* of smuggling," etc., and rewards the seizure of goods *unshipped* or *landed* without payment of duties, which accrued on importation.

The Act of July 15, 1820, being 1 George IV, Ch. 43 (60 Stat. at L., 174–187), is entitled "an act to *amend* the laws relating to smuggling and the coasting trade of Great Britain." It amplifies and adds to the common law and previous statutes, but substitutes no new definition for the common-law offense of smuggling.

The Act of July 5, 1825, being 6 George IV, Ch. 108 (65 Stat. at L., 740), is entitled "an act for the prevention of smuggling." The same can be said of this as of the former act.

The Act of August 28, 1833, being 3 and 4 William IV (73 Stat. at L., 408), Ch. 53, was an amendment of the former statute.

The Act of May 22, 1834, being 4 and 5 William IV, Ch. 13 (74 Stat. at L., 18), was an amendment of the previous statute.

The Act of August 4, 1845, being 8 and 9 Victoria, Ch. 87 (85 Stat. at L., 660), is an amendment of the two previous statutes, and as it was passed subsequent to Section 19 of the Act of August 30, 1842 (5 Stat., 548, 565), it could not have been in the mind of Congress at that time, and, besides, does not change the common-law definition of smuggling. The

same may be said of the Act of August 20, 1853, being 16 and 17 Victoria, Ch. 107 (93 Stat. at L., 718), and the Act of July 24, 1876, being 39 and 40 Victoria, Ch. 35 (Law Reports [Statutes], Vol. XI, 1876).

These numerous English Statutes only emphasize what we have already stated, that there is a common law offense of smuggling, as defined from 1716 to 1896, both inclusive, by Hawkins, Russell, Gabbet, Gilbert, and Bacon, and that August 30, 1842 (5 Stat., 548, 565), Congress adopted that definition as a part of the act, to all intents and purposes as if embodied in the text (*ante* pp. 5, 13), *United States vs. Smith* (1820), 5 Wheaton, 153, 160. With the growth of commerce, and, therefore, with the increase of motives for defrauding the revenue, the English Parliament kept pace by the frequent enactment of new and the amendment of old statutes. Neither the English Treasury nor the Attorney or Solicitor-General asked the Courts to construct a new crime, but resorted to the legislative body to enact new laws having a prospective operation. The policy of a government is to be determined *by the language it uses* in its legislative enactments. *Hadden vs. Collector* (1866), 5 Wallace, 107, 111–112; *St. Paul, etc., Ry. Co. vs. Philps* (1890, 137 U. S., 528, 533.

It was said in Stephen's General Views of the Criminal Law of England (2d Ed., 1890), 64, that—

"The common and statute law are mixed up in nearly equal proportions in our criminal law, and that nearly every part of it, though not to the same degree, is affected by each. It is also true that it is practically impossible to study the two apart. The statutes are unintelligible and a mere burden to the memory without the common law. The common law can be understood by itself, but unless it is studied in connection with the statutes it is, so to speak, disembodied and almost exclusively theoretical."

The frequent necessity for amending and supplementing statutes is well illustrated in 6 Bacon's Abridgement (Fifth Ed., 1798), 373, where he said:

"A statute can do no wrong, but it may do some things which seem very strange."

The statutes cited are all affirmative statutes, and the rule governing them is well settled. It is thus stated in 6 Bacon's Abridgment (5th Ed., 1798), 376:

"Some statutes are from their being in affirmative terms called affirmative statutes; others obtain the name of negative statutes because they are penned in negative terms. *It is a maxim of law that an affirmative statute does not take away the common law.*"

In *Arthur vs. Bokenham* (1708), 11 Modern Rep., 148, *Lord Chief Justice Trevor* said (p. 150) that:

"The general rule in exposition of all acts of Parliament is this: that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of common law in cases of that nature, for statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare; therefore in all general matters the law presumes the Act did not intend to make any alteration, for if the Parliament had had that design they would have expressed it in the Act."

We had occasion in our brief (pp. 34–37) to discuss the opinion of *Mr. District Judge Benedict* in *United States vs. Claflin* (1875), 13 Blatchford, 178. A part of this opinion, cited by the learned counsel for The United States, defendant in error (their brief, p. 47), shows a reference to 16 and 17 Victoria, ch. 107, Sec. 244. It is to be kept in mind that *Mr. District Judge Benedict* did not have before him Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), but the Act of June 22, 1874 (18 Stat., 186). The English statute cited by him was passed August 20, 1853, eleven years after the passage of Sec. 19 of the Act of August 30, 1842, and the indictment, trial, and opinion in the *Claflin case* were in the year 1875, during the period that the first half of Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), punishing

smuggling, was inadvertently omitted from the Revised Statutes (our brief, pp. 6–8, 34–37; this brief, *ante*, pp. 2–5). The court was not interpreting or construing Sec. 19 of the Act of August 30, 1842 (5 Stat., 548, 565), now Sec. 2865, Revised Statutes, and, as we have already argued, the same words may have a different meaning in each statute wherein it is found (our brief, pp. 29–34).

(c.) *English decisions.*

A number of English decisions applying the English statutes have been cited by the learned counsel for the United States, defendant in error (their brief, pp. 27–29).

Wilson vs. Saunders (1797), 1 B. & P., 267, turned on the language of the Act of 11 and 12 Wm. III, chap. 10, Sec. 2. The learned counsel for the United States, defendant in error, do not correctly state the provisions of that statute, and the decision throws no light on the question in the case at bar.

Attorney General vs. Towns (1818), 6 Price, 198, turned on the Act of 17 Geo. III, c. 39, Sec. 25. It was admitted that the evidence established *overt acts* of *unshipping* the glass on *Essex coast.* The court submitted the question of *intent* to the jury. The jury having found that the *intent* was *unlawful*, and a motion for a new trial having been filed, led *Baron Graham* to say that the "very suspicious circumstances of the transaction warranted the verdict."

Lord Chief Baron Richards and *Barons Wood* and *Garrow* said the evidence sustained the verdict.

Attorney General vs. Tomsett (1835), 2 Crompt. M. & R., 170; 5 Tyrwhitt, 514, turned on the Act of 6 Geo. IV, c. 108, Sec. 45. The offense was that of *unshipping.* The *over acts* were *unshipping*, and there was a violation of the *English statute.* This throws no light on the offense of smuggling.

Attorney General vs. Robson (1850), 5 Exchequer, 790, turned on the Act of August 4, 1845, 8 and 9 Victoria, chap. 87, Sec. 46, punishing a person for the *statutory* offense of being concerned in illegal "*unshipping.*"

Attorney General vs. Catt (1837), 3 M. & W., 7, turned on the Act of August 28, 1833, 3 and 4 Wm. IV, ch. 53, Sec. 44, punishing a person for the *statutory* offense of "*unshipping.*"

(*d.*) *American legislation.*

The Act of July 4, 1789, (1 Stat., 24), was the first Federal statute levying a duty on imports, and until the passage of that act no frauds were possible on the Federal revenue derived from imports. There were no common-law crimes against the Federal Government, and statutes to protect the revenue were passed from time to time and various *sanctions* provided.

The Acts of July 4, 1789, July 31, 1789, September 16, 1789, August 4, 1790, March 3, 1791, March 2, 1793, June 5, 1794, June 7, 1794, January 29, 1795, February 26, 1795, March 3, 1795, May 27, 1796, June 1, 1796, June 1, 1796, March 3, 1797, December 1, 1797, March 2, 1799 (1 Stat., 24, 29–49, 69, 145–178, 219, 336, 378, 390–392, 411, 420–423, 426–432, 476, 492, 495, 502, 503, 509, 536, 627–704); May 10, 1800, May 13, 1800, March 26, 1804, March 27, 1804, April 21, 1806, February 25, 1813 (2 Stat., 72, 84–85, 291, 304, 399, 804); March 3, 1815, February 5, 1816, April 27, 1816, January 14, 1817, March 1, 1817, April 20, 1818, April 18, 1820, March 2, 1821, March 3, 1823 (3 Stat., 231, 253, 310, 344, 351, 433, 458, 460, 461, 563, 616, 781); January 7, 1824, March 2, 1827, May 19, 1828, July 14, 1832, March 2, 1833 (4 Stat., 2, 235, 270, 583, 635, 644) were a few early statutes levying duties, regulating their collection, and imposing forfeitures. Congress had the tariff question before it, consequently, but it was not until August 30, 1842 (5 Stat., 548, 565), that a statute (Sec. 19) punishing "smuggling" was passed. Changes in the methods of handling merchandise, grown up since August 30, 1842, will not justify a court in 1898 in building up or constructing a new legal meaning to a word having a fixed legal meaning at the date of the passage of the law (our brief, p. 9). The proper way

is to indict under a proper statute, if any, and if not, to procure *prospective* legislation.

(*e.*) *Federal decisions.*

The cases cited by the learned counsel for the United States, defendant in error, in their brief (pp. 29–38), range in time from 1824 to 1887, construe numerous different statutes, and each case rests upon the *language* of each statute. They protest too much that they are not begging the question (their brief, p. 33).

The word "smuggle" has a well-defined legal meaning (our brief, pp. 8–15, 21–25; *ante*, pp. 5–6, 11–13), and is to be understood as defined in the treatises on the common law (*United States vs. Palmer* (1818), 3 Wheaton, 610, 630, 640; *United States vs. Smith* (1820), 5 Wheaton, 153, 159–160; *United States vs. Davis* (1829), 5 Mason, 356, 362; *Swearingen vs. United States* (1896), 161 U. S., 446, 451).

The case of *United States vs. Hartwell* (1867), 6 Wallace, 385, does *not* hold that a word having a defined meaning at common law, when incorporated into a statute, shall not be given that meaning, and *United States vs. Smith* (1820), 5 Wheaton, 153, 159–160, directly holds that "*the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law. In fact, by such a reference the definitions are necessarily included as much as if they stood in the text of the Act.*"

IN CONCLUSION.

For the other points dwelt on by the learned counsel for the United States, defendant in error, we refer the court to pages 80–81, our brief (dated October 8, 1898), which gives the references to the Revised Brief (dated October 9, 1897). As to the suggestion as to a proper sentence, this court has no power to fix it at a year and a day.

This case involves not merely the liberty of a single cit-

izen, but the principle which separates arbitrary from free governments—justice ccording to law from justice according to the will of the magistrate in each concrete case presented. The definition at the common law is clear and certain and ought to be followed.

It is unbecoming to discuss the weight of the evidence, the inconsistency of the testimony of Captain Loesewitz with itself and the other evidence; but assuming, for the sake of argument, the strongest case the evidence presents against Mr. Herman Keck, plaintiff in error, the conviction ought to be set aside and plaintiff in error discharged.

Respectfully submitted.

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Counsel for Herman Keck, Plaintiff in Error.

WASHINGTON, *November* 10, 1898.

No. 551. 1896. 15

Brief of Atty. Gen'l (Whitney)

O. E.

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DEC 16 1896
JAMES H. McKENNA

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 551.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 551.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR.

Herman Keck, plaintiff in error, was indicted for the smuggling, on February 11, 1896 (the date 1890 in the indictment, on page 1 of the record, being a copyist's error), of certain diamonds at the port of Philadelphia. He was tried before Judge Butler and a jury May 27, 1896, and convicted upon the first and second counts of the indictment (the third count having been excluded from consideration of the jury).

The first count of the indictment is drawn under § 3082 of the Revised Statutes, which makes it criminal—

> If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise contrary to law. * * *

The second count is based on § 2865, which makes it criminal—

> If any person shall knowingly and wilfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares, or merchandise subject to duty by law, and which should have been invoiced, without paying or accounting for the duty. * * *

STATEMENT OF FACTS.

Herman Keck, plaintiff in error, is connected with various corporations doing business at 19 and 21 West Fourth St., Cincinnati, Ohio, a building bearing the signs of the Keck Manufacturing Company, the Keck Diamond Company, and the Coeterman-Henrickson-Keck Diamond Company. Franz Van Reeth is a diamond cutter connected with the last named concern, receiving a third of the profits thereof for his services. Frank Loesewitz is captain of the steamer *Rhynland*, of the International Navigation Company, now plying between Philadelphia and Liverpool. He is a citizen of Antwerp, in the Kingdom of Belgium. Franz Von Hemmelrick is a jeweler in Antwerp, a friend of Loesewitz (p. 23), and at least an acquaintance of Keck (p. 100).

Keck testifies that he is a manufacturing jeweler, and that the company last named was organized for the purpose of cutting diamonds, so that it imports diamonds only in the rough. For the Herman Keck Manufacturing Company he has imported cut diamonds (p. 96). He admits that he went to Antwerp in January, 1896, stating that his business was to buy rough diamonds for the Coeterman-Henrickson-Keck Diamond Company; and he

admits that on January 27, 1896, he was in the city of Antwerp upon that business (pp. 96–7). The transactions which, as found by the jury, made him responsible for the subsequent smuggling at Philadelphia, occurred in Antwerp on that day.

The testimony as to the main points in suit is in conflict, Keck even denying that he knew Captain Loesewitz at all, although Loesewitz was able to describe his personal appearance so well that the revenue officers were able to pick him out without difficulty among the passengers of a large ocean steamer when he reached this country in the following month. The testimony in the case for the Government rested upon the testimony of Captain Loesewitz, corroborated in important particulars by other witnesses. The Government's case was in brief as follows:

Captain Loesewitz, on January 27, 1896, was making a social call on Mrs. Von Hemmelrick, at Antwerp, when her husband came in with Keck and proposed that they should go out and have a glass of beer. Loesewitz had never met Keck before, and can not even remember whether he was introduced by name. The party went to the *Café Alsacienne*, on the Place Vert. This was in the afternoon, at a time when, according to the custom of Antwerp, Government offices are closed and people go into the restaurants to play cards and dominoes, write their letters, etc. There is always ink on the tables.

During the conversation Von Hemmelrick took a small package out of his pocket and showed it to the captain, saying: "This package belongs to that gentleman here,"

adding: "Will you oblige me to take that over to America? It belongs to him. It belongs to that gentleman. He is a customer of mine. It does not contain any valuables." Keck also said that it contained no valuables. The captain noticed that there was no address on the package, and said to Keck: "Where shall I send it to?" Keck then tore a piece of paper off a card lying on the table and put an address on it. The address was T. van Reeth, 21 or 24 4th st., Cincinnati. The paper was produced in the court. After staying about a quarter of an hour in the café, the party walked out and separated on the Place Vert. Before separating, Keck told the captain to send the parcel by Adams Express. He did not state what was in the package, nor explain who Van Reeth was, and the captain did not see him again before he left Antwerp the same night (pp. 23–6, 37, 40).

Captain Loesewitz sailed on the *Rhyland* January 29. He did not invoice or manifest the box (pp. 26–7, 73).

On arriving at quarantine on the river, a couple of custom house officers boarded the vessel, which landed in Philadelphia half an hour or an hour later, on February 11, 1896, about four or five o'clock in the afternoon. After the passengers were all ashore, the captain received a call from two gentlemen with whom he was not acquainted. They were Messrs. John C. Gallen and James C. Cummings, special agents of the Treasury Department (pp. 27, 36, 43, 59). These gentlemen were following up information which they had received through Mr. Frankel, secretary of the Diamond Cutters' and Importers' Protective Association (p. 61), which is an association to prevent the violation of the revenue laws in the

matter of the importation of jewelry, composed of the most reputable diamond brokers in New York City and of the entire dealers of the United States (p. 62).

Captain Loesewitz and the two Treasury agents each give an account of the conversation, the accounts being substantially the same, though, of course, varying slightly in detail. The captain's account is as follows (p. 27):

> When I reached the port of Philadelphia, after the passengers were landed, two gentlemen entered my room and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, "Yes." I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally, on my part, I asked them who they were. They said they were Treasury agents, and said, "Captain, that's a package of diamonds you have got to be sent to Cincinnati," and if I didn't deliver it I would be arrested. After awhile I went down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened.

Mr. Gallen states that on the arrival of the *Rhynland* he first examined the passenger list to find Keck, and the manifest to find diamonds, in both respects without result. After attending to one or two other matters, he states that he went into the chart-room, where the captain was, with Mr. Cummings. His account of the conversation is as follows (pp. 43–4):

> I spoke of the weather and other topics, and then I said, "Captain"—to whom I was unknown—"you have a package for the Coeterman Diamond Company—the Coeterman-Keck Diamond Company, 24 West Fourth Street, Cincinnati, Ohio?" I repeated

the name of the company. He said, "No; I have no such package." I said, "I beg leave to differ with you," and, indicating with my fingers, I said, "You have a small package which you received while in Antwerp." He said, "I have a package for Van Reeth, of 21 West Fourth Street, Cincinnati, Ohio, and I will give it to you if you have an order for it."

Q. At that time, I understand you to say, he did not know you were a Treasury agent?

A. No, sir; I was unknown.

Q. Had you ever met him before?

A. Never met him before to know him. I then said, "Captain, I have an order for them." He said, "Show me the order, and I will go and get the package." I replied, "Captain, I would like to see the package first before delivering the order, and I want to speak to you in private."

Q. Was there anything on your clothes like a badge or anything else to show what you were?

A. No, sir; none whatever. He was doing some writing at the time—I think finishing the log—and he asked me to wait until he finished, and I said, "Certainly." After the lapse of about five minutes the captain arose and said, "You remain here, and I can go and get the package." As soon as the captain left the chart-room I quietly and unperceived by him followed him and saw him enter his room, and just as he emerged he had a package in his hand. As soon as I saw it I said, "Captain, that is the package I want." He said, "Where is your order?" I produced my card as United States Treasury agent. He refused to let me have it until I was identified as a custom-house officer. A young man present at the conversation opposite the captain's room, who represented the steamship company—we agreed to

go back to the chart-room, where I again insisted on getting this package, and this young man who represented the steamship company, who was present, advised the captain to give the package to me, which the captain did. I then searched thoroughly the captain's room and also other parts of the vessel, but did not find any other dutiable stuff, after which I went into the chart-room again and opened the package in the presence of the captain—broke the seal and opened the package.

Mr. Cummings gives the following account (p. 59):

A. I came in as the captain said he had a package for Van Reeth, Cincinnati.

Q. Did you hear whether he was asked that question before he answered it?

A. That I do not know.

Q. You just heard him say that as he entered?

A. Yes, sir; he then asked Mr. Gallen if he had an order for the package and Mr. Gallen said that he had, and the captain said, "Give me the order and I will give you the package." Then Gallen said, "Give me the package and I will show you the order." After the captain had finished writing off his log book the captain said he would go down and get it. He started down and Mr. Gallen followed him down the room, and I went down also, and the captain produced the package down in his room.

The box had no address whatever upon it. Mr. Gallen broke the seals and opened the package in the presence of the captain. It turned out to contain 563 diamonds, of which 28 were wrapped up separately in finer paper and placed in cotton. They were all cut diamonds dutiable at 25% (pp. 44–5, 59, 73). Although

these diamonds were subsequently appraised at $6,306.60 and libeled for forfeiture with due proclamation, no claimant for them ever appeared (pp. 74–9).

On the following day, February 12, Mr. Gallen had a further interview with the captain, who could not remember the name of the man from whom he had received the package, but "described him as a man about the size of Collector Reed, not quite as stout, a small, reddish brown moustache, small features, small eyes and blonde complexion." Gallen then went over to New York to await the arrival of the *Aller*, on February 14. He boarded her on a revenue cutter at Staten Island, identified a man corresponding to that description, went up and said to him: "Is your name Keck?" He said, "Yes." Keck then denied knowledge of Mr. Loesewitz or of the package which the captain had carried (pp. 46–7). Keck showed great indignation at the suspicions against him, and agreed to go to Philadelphia to meet the captain, but subsequently backed out of the agreement. Gallen testifies that he held the package so that Keck could not see it, and said, "Here is the package which belongs to your firm, the Coeterman-Keck Diamond Company of Cincinnati." Keck said, "There is no address on that package" (p. 48). Gallen answered, "That is a good description of the package. There is no address on it;" and added, "The captain was instructed to deliver it to Van Reeth, 21 4th St., Cincinnati, Ohio." Keck said, "That is a different firm from the Keck Company." Gallen said, "Are you not a member of the same firm as Van Reeth?" Keck said, "Yes, I am;" but denied

that the package belonged to that firm, and said, "I am the only one that has a right to purchase diamonds for either one of those concerns" (p. 49). Keck further said that he imported into the port of Cincinnati $100,000 worth of diamonds from the first of the year. Gallen replied that "I had a telegram in my pocket in reply to a telegram sent to the appraiser at the port of Cincinnati, and that the total amount of his importations of diamonds at the port of Cincinnati from the first of January to that date did not exceed the value of the assignment which I found in the possession of the captain at Philadelphia, and they were valued at $7,000." Keck then said, "What are the total amounts of my importations?" Gallen said, "You know. I am not going to tell you" (p. 50). Keck said to Inspector Donahue, who was watching him at this time, "it was ridiculous to detain him to suspect that he was smuggling in diamonds; that he was doing a business of nearly $300,000 a year, and was importing his diamonds regularly." He further said that he did all the buying of diamonds for the firm in Cincinnati (pp. 63, 68–9). He also admitted that he might have been at the *Café Alsacienne* on January 27 (p. 67).

Keck arrived in company with a young man named Van Reeth, who, he said, was a son of the manager of his firm (pp. 48, 64).

Keck was brought before the United States Commissioner for a hearing on February 18 (p. 11). The captain gives the date as March 18, which seems to be an error (p. 28). Captain Loesewitz had not previously seen him since the interview at Antwerp. There were quite

a number of people in the corridor making application to be naturalized. The captain was asked to identify the man that he got the diamonds from. After walking down to the foot of the corridor and back again, he recognized him, saying, "That is the man; no doubt about it" (pp. 57–8). At this hearing, also, the captain first produced the paper given him by Keck in Antwerp containing Van Reeth's address (pp. 50–1). The paper that was produced contained writing in some foreign language, either Flemish or Dutch (p. 104).

ARGUMENT.

I.

If either the first or second count of the indictment is good, the verdict must stand.

This is well settled, since the two counts describe the same criminal act. (*Claassen* v. *United States*, 142 U. S., 140, 146; *Evans* v. *United States*, 153 U. S., 584, 595; *Goode* v. *United States*, 159 U. S., 663, 669.) There is no difference in the degree of crime or the nature of the punishment.

II.

The second count in the indictment is good.

The first count is substantially in a form held insufficient in *United States* v. *Kee Ho*, 33 Fed. Rep., 333, and cases cited. As the second count seems undoubtedly good, it is unnecessary to discuss this one.

In discussing the second count, it should be borne in mind that, even though a demurrer be interposed, § 1025

of the Revised Statutes makes all merely formal objections unavailable after verdict, unless it appears "that the substantial rights of the accused were prejudiced." (*Connors* v. *United States*, 158 U. S., 408, 411.) Mere lack of particularity is not a sufficient ground for annulling an indictment. Defendant's remedy is by application for a bill of particulars. (*Durland* v. *United States*, 161 U. S., 306, 314, 315; *Dunbar* v. *United States*, 156 U. S., 185, 192; *Cochran* v. *United States*, 157 U. S., 286, 290.) The present indictment appears to be as full and particular as a defendant has any right to ask, and the objection on the ground of duplicity has been very properly dropped. (*Crain* v. *United States*, 162 U. S., 625, 636.)

The second count is very similar to one of those sustained in *Dunbar* v. *United States*, 156 U. S., 185; namely, the count set forth at pp. 186–7. The present indictment is fuller in the allegations of *scienter*. It omits to state the country from which the goods were imported, but this is not a vital matter and in no wise prejudiced defendant. It also omits to state the specific rate of duty applicable to the diamonds imported, merely alleging that there was a duty imposed upon them by act of Congress; but there is only one rate at which diamonds are dutiable, and the reason for the specific allegation in the Dunbar indictment was that there were several different rates of duty applicable to opium, which was the subject of the smuggling in that case.

Defendant complains that the indictment should have alleged specifically that these diamonds were not miners', glaziers', or engravers' diamonds, which are specially

mentioned in the free list (tariff act of August 28, 1894, par. 467); but it is not ordinarily necessary to negative exceptions in preparing indictments (*United States* v. *Cooke*, 17 Wall., 168), and the exception is sufficiently negatived in this indictment by the statement that the diamonds were subject to duty.

The defendant also insists that his attempt to defraud the Government could not constitute the crime of smuggling because all diamonds, by a true construction of the statute, are upon the free list, although the Treasury Department and the courts have ruled otherwise. The question was brought to this court at the last term by application for a writ of *certiorari* from a decision of the Circuit Court of Appeals for the Second Circuit. The writ was refused (163 U. S., 687). The arguments in favor of the dutiability of diamonds are to be found in the opinion of Judge Townsend at Circuit (*United States* v. *Frankel*, 68 Fed. Rep., 186), and in the brief filed by the undersigned upon that application. It is admitted, of course, that the denial of a writ of *certiorari* by this court does not necessarily involve a ruling upon the merits of the cause. It is, however, submitted that a question of dutiability once decided by the Court of Appeals, with which decision, upon such an application, this court has indicated concurrence (for in the Frankel case it was conceded that the magnitude of the amount involved was sufficient to warrant the issuance of a writ of *certiorari* if the question of law were a serious one), should not be reopened on behalf of an importer who is endeavoring to obtain free entry by fraud upon

the Government, instead of by application to the courts. The appellant in the case just cited was the very Mr. Frankel through whose efforts on behalf of the reputable diamond dealers of the United States this prosecution was instituted.

III.

The Government's testimony, having been found to be true by the jury, sustains the conviction.

(1) Keck was responsible for Loesewitz's illegal acts. Indeed, Keck alone was responsible for the enormity of the crime, Loesewitz supposing he was committing only a trifling irregularity of a kind familiar probably to most of the passengers on an incoming ocean steamer. If, then, Loesewitz smuggled or clandestinely introduced goods, Keck is responsible criminally.

It will be noticed that this section, like many others of the Revised Statutes, expressly provides that the criminal act should be *a misdemeanor*. This is doubtless done for the purpose of avoiding the technicalities of criminal law with respect to felonies. We are thus relieved from examining into the disputed question whether a person abroad, instigating or directing the commission of a felony here, is punishable.

It has always been well settled that there is no distinction between principals and accessories before the fact in misdemeanors, and that "he who procures another to commit a misdemeanor is guilty of the fact in whatever place it is committed by the procuree." (*Commonwealth* v.

Gillespie, 7 S. & R., 469, 478; *Commonwealth* v. *Ray*, 3 Gray, 441, 448; *Commonwealth* v. *Blanding*, 3 Pick., 304, 311; 1 Bish., New Crim. Law, § 656.)

Hence, whatever may be the case with regard to felonies (id., 651; *State* v. *Grady*, 34 Conn., 118, 129–31), it is well settled that in the case of misdemeanors "a crime is in law committed in the place where the doer's act takes effect whether he himself is in such place or not. * * * In this way one may even perpetrate an offense in a state or country upon whose soil he never set foot." (1 Bish., New Crim. Proc., § 53.) The trial of misdemeanants who never were personally within the territorial jurisdiction of the court is more common in prosecutions for conspiracy, such as *The King* v. *Brisac*, 4 East, 164, 170, and *Dealy* v. *United States*, 152 U. S., 539. It is, however, unnecessary that the indictment be in form for a conspiracy. Whether Loesewitz was so far implicated that an indictment for conspiracy against himself and Keck together would have been sustainable, or whether he was so far an innocent agent that he should be regarded merely as a tool in Keck's hands, the latter is responsible to the laws of the United States, and is to be tried within the particular district wherein the crime was committed. In one recent and familiar case, where the crime charged was the mailing of an unlawful letter from New York to Connecticut, the defendant was held for trial in the latter district, in which it did not appear that he had ever been personally present. (*In re Palliser*, 136 U. S., 257; see also *Horner* v. *United States*, 143 U. S., 207; *Commonwealth* v. *Smith*,

11 Allen, 243, 259; *Lindsey* v. *State*, 38 Oh. St., 507; *United States* v. *Rindskopf*, 6 Biss., 259, 268; 1 Bish. New Crim. Proc., §§ 57, 58.)

(2) Keck, through Loesewitz, smuggled the diamonds into the United States.

It is first necessary to ascertain the legal definition of the word "smuggled" as used in § 2865. The crime being statutory, the word has no common law definition which is of assistance in the present case.

§ 2865, in its present form, incorporates the language of the tariff act of August 30, 1842, c. 270, § 19. No authoritative definition of the word "smuggled" in that statute was ever made. The provision of that statute with relation to smuggling was assumed to be impliedly repealed by the act of July 18, 1866, c. 201, § 4, now Rev. St. § 3082, set forth at the commencement of this brief. For this reason the revisers in dealing with the act of 1842 omitted this provision. Whether or not the provision had been repealed in 1866, it was thus without doubt repealed on June 22, 1874. (Rev. St., §5596.)

On the same day, however, the Anti-Moiety Act was passed, which not only provides remedies against smuggling, but defines the word as follows (act of June 22, 1874, c. 391, § 4):

> That for the purposes of this act smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination.

The act of February 27, 1877, c. 69, amended § 2865 of the Revised Statutes so as to restore the provision of 1842 against smuggling. Up to this time no authoritative definition of the word as used in the section thus amended had been given. It is presumable, therefore, that it is used in the same sense as in the Anti-Moiety Act of 1874; for it can not be supposed that the Congress of 1877 should in adopting a new criminal statute use words in a sense different from that with which they were already defined on the statute book, without giving them a new definition.

It remains, then, to inquire whether the diamonds were actually smuggled, within the statutory definition of 1874. Whatever the intent of Loesewitz may have been, there can be no doubt that Keck intended to defraud the United States. Either Loesewitz withheld part of the story, and he and Keck both had a criminal intent in this degree, or else Keck was defrauding Loesewitz and the United States together, using the captain as a means for conveying the box of diamonds through the port of Philadelphia without paying duty thereon.

It is clear from the testimony that Loesewitz was ready to give up his box without first exhibiting it to the customs officials. He said, according to Gallen, "Show me the order and I will go and get the package;" and on being asked to get the package first, went and got it, asked Gallen for the order, and did not until then learn that he was a Treasury agent. Mr. Cummings' testimony is substantially the same.

Had he suspected that the package was valuable he certainly would have avoided exhibiting it, for fear of

the penalty for carrying unmanifested goods (Rev. St., § 2809); knowing, also, that it would not be admitted to entry (act of June 10, 1890, c. 407, § 4).

His own testimony varies slightly from the others, as he says that he learned of their being Treasury agents before he went to get the package. This is immaterial, however, for he does not attempt to deny, although himself also under indictment and therefore interested in making himself out as innocent as possible, that he was willing to give the package up at once without stopping to exhibit it to the custom-house inspectors.

Keck's intent to defraud is clearly shown by his statement to Loesewitz that the package did not "contain any valuables." Nobody would have entrusted another man with $6,000 worth of diamonds with such a statement, except for the purpose of using the other man as an instrument by which to commit a fraud upon the United States.

The intent to defraud is thus clearly established.

Were the goods imported?

They were imported at the very moment when the vessel entered the port of Philadelphia.

It was originally claimed by the Treasury Department that goods are imported into the United States as soon as they arrive within the limits of a collection district. This contention was overruled by the courts, but it was always admitted that the importation was complete when the goods reached a port of entry. (*United States* v. *Vowell*, 5 Cr., 368; *Arnold* v. *United States*, 9 Cr., 104; *Meredith* v. *United States*, 13 Pet., 486, 494; *Harrison* v.

Vose, 9 How., 372, 382; see also *United States* v. *Lyman*, 1 Mason, 482, 499.) The latter question came up directly before Mr. Justice Curtis in *United States* v. *10,000 Cigars*, 2 Curtis, 436. That was a forfeiture proceeding against certain cigars which had not been landed. The learned justice said:

> An importation is complete when the goods are brought within the limits of a port of entry with the intention of unlading them there.

It has been recognized in our statutes, from the earliest times, that an importation is complete when the goods are brought within a port of entry, even if the intention is to reexport instead of to unlade. Thus the Collection Act of August 4, 1790, c. 35, § 18, provides:

> That it shall be lawful for the said ship or vessel to proceed with any goods, wares or merchandise brought in her which shall be reported by the said master or other person having the charge or command of the said ship or vessel, to be destined for any foreign port or place from the district within which such ship or vessel shall first arrive, to such foreign port or place, without paying or securing the payment of any duties upon such of the said goods, wares, or merchandise as shall be actually *re-exported* in the said ship or vessel accordingly.

Goods cannot be "re-exported" unless they have been imported. This provision was repeated in the Collection Act of March 2, 1799, c. 22, § 32, and with some changes in the act of February 22, 1805, c. 18, § 2, which now appears in the Revised Statutes as § 2776.

The act of August 6, 1846, c. 84, § 1, now incorporated in the Revised Statutes as § 2979, also recognizes that

landing upon our soil is not necessary to the act of importation by providing "an entry to re-export" merchandise which is to be "landed out of the jurisdiction of the United States." The Customs Regulations of 1857 accordingly provided a form of "entry for warehouse and exportation" on proof that the goods "are to be exported immediately by sea beyond the limits of the United States," and provided that upon receiving such an entry, the collector and naval officer "shall issue a permit addressed to the inspector of the vessel by which said goods were imported, directing him to send said goods to the vessel in which they are to be exported, the import vessel being considered the warehouse;" provided "an opportunity exists for immediate export" (Art. 477). Corresponding provisions are to be found in the Customs Regulations of 1892 as Articles 602, 603.

In 1885 certain sugar was brought into the port of New York for re-export in the same vessel to England. Whether it could be done under the customs acts and regulations was a question submitted to Judge McCue, then Solicitor of the Treasury. His opinion of April 29, 1885, is incorporated in Syn. Dec. 6896. He said: "Upon the arrival of a vessel at the port of entry, with intent to unload, the importation is complete." After describing the statutes and regulations, he says: "All these proceedings are necessary for the protection of the revenue if the goods are actually unladen; but in the case presented the goods imported are not unladen. * * * In view of the provisions of the law, I think that in the case presented a customs entry for warehouse and exportation may be made accurately describing the

goods to be exported; that for this purpose the vessel may be made the warehouse; and that the exportation of the cargo may be made in the same vessel," etc. His advice was followed, and the precedent gave rise to a special regulation for such cases. (Customs Regulations, 1892, Art. 605.)

The question when an importation becomes complete often arises under the act of March 28, 1854, c. 30, now Rev. St., § 2971, providing that "goods remaining in public store or bonded warehouse beyond three years shall be abandoned to the Government." In *Hartranft* v. *Oliver*, 125 U. S., 525, 529, this court, speaking by Mr. Justice Field, approved the Treasury regulation of 1857 which construed this clause so that "the period limited for their remaining in a public store or a bonded warehouse includes the time on shipboard after the arrival of the ship in port." This case arose under a certain provision of the tariff act of March 3, 1883, c. 121, which went into effect on July 1 of that year. A certain vessel arrived at Philadelphia on June 30, but the goods were not unladen until after July 1. The custom house officers of course took charge when the vessel arrived. The question arose whether on July 1 the goods were in a public store or bonded warehouse within the meaning of § 10 of the act. The court said:

> Ordinarily, goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse, and thus the designation of the goods as thus placed is, in the legislation of Congress, in effect a designation, and no more, of their being in such custody. But goods on board of a

> ship, in charge of a custom house officer, preliminary to their removal to a public store or a bonded warehouse, and during the time necessary for that purpose, are in like custody, and so are, within the spirit and intent of the law, subject only to such duties as are leviable when the goods are freed from such custody. * * * We are therefore of opinion that, within the spirit and intent of the 10th section of the act of March 3, 1883, the goods were not chargeable with duties whilst on board the bark [etc.].

Some of the remarks of Judge Sawyer in the case of *McLean* v. *Hager*, 12 Sawy., 473, made prior to this decision, are therefore not strictly accurate, although the case was properly disposed of.

Upon like grounds, goods imported from the British provinces in steamers stopping first at Eastport must be entered and assessed there, although they are not to be actually landed until they arrive at Portland or Boston. (*Saltonstall* v. *Russell*, 152 U. S., 628.) So also "when goods have arrived at the port of New York, and the arrival of the vessel has been reported at the custom house and then the goods, with the consent and allowance of the collector under the provisions of the first and second sections of the act of June 10, 1890, have been shipped to Chicago, such goods must be deemed to have been warehoused from the time of the arrival of the ship." (*Seeberger* v. *Schweyer*, 153 U. S., 609, 613.)

In *Kohne* v. *Insurance Co.*, 1 Wash. C. C., 158, 165, Mr. Justice Washington, in charging the jury, says: "The literal meaning of importation is to bring in with intent to land." To bring in with intent to land certainly constitutes an importation. The only criticism

that can be made upon this definition is that it omits to cover such a case (not relevant here) as a bringing in with intent to re-export (*supra*), or the importation of a boat not intended to be put ashore (Syn. Dec. 7048, 7061, 7937, 8901, 8975; act of April 18, 1874, c. 110). By thus restricting the definition, the learned justice gave perhaps an over-technical construction to the act of 1799; but his definition is broad enough to cover the case at bar. The same definition is given by Mr. Justice Story in *Schooner Mary and Cargo*, 1 Gall., 206, 209:

> As to revenue laws, I am well satisfied that an importation into the United States means not merely a bringing within our jurisdictional limits, but also a bringing into some port, harbor, or haven, *with an intent to land the goods there*. It is undoubtedly true that the mere act of coming into a port, though without breaking bulk, is *prima facie* evidence of importation [etc.].

Goods which have arrived in port have always been regarded as subject to customs duties unless specially exempted therefrom, even if they be at once transferred to another ship for export, so that they "always were water-borne and never touched the land," as decided in 24 Elizabeth (12 Co., 18). In *Leaper* v. *Smith*, Bunbury, 79, it was decided by the Exchequer in 1721 that goods "shall be deemed an importation if within the limits of the port," etc.

The words "bringing into the United States" in the Anti-Moiety Act seem clearly equivalent to "importing into the United States." The case at bar therefore comes within the narrowest definition of the word "smuggling."

The goods were brought into a port of entry in a vessel which was in the custody of the custom house officers. They were brought with intent to land them without passing through the custom house or submitting them to the officers of the revenue for examination. They were brought with intent to defraud the United States.

If, however, the phrase "bringing into the United States" means something more than importation, still the case would come within the other clause of the Anti-Moiety Act relating to "attempting to bring into the United States." If the former phrase requires the goods to be put ashore, the latter phrase surely is met when it appears that the goods were on board a vessel tied to the wharf, and that their clandestine transit through the custom house was stopped only by the captain's mistake in supposing his callers to be agents of the owner instead of agents of the United States Treasury.

Nor would even an intent on the captain's part to show the goods to the customs officers be material to establish *against Keck* a charge of attempting to bring, etc. He clearly contemplated no such action on the captain's part.

The case being one of smuggling, it is unnecessary to consider here the words "clandestinely introduce" in the statute (see VI, *infra*).

IV.

The refusal of a dedimus potestatem was no error.

Keck was indicted May 18. He had been arrested February 15 and bound over to the Grand Jury February 18 (pp. 11–12). On May 26 he filed an application "for a *dedimus potestatem* to take depositions at Amsterdam,

Holland, and Antwerp, Belgium, in pursuance of § 866 of the Revised Statutes" (p. 6). Affidavits having been submitted upon both sides, the court denied it upon the following grounds (p. 11):

> First. That the statute relied upon is not applicable to the criminal court nor to trials of causes therein.
>
> Second. That if it was, the circumstances shown do not call for its application in this case at this time; that it does not appear that the presence of the witnesses could not have been procured by proper effort, and that if it did appear it should be held that the application comes too late; that it might have been made months ago, and all delay in consequence of granting it avoided.

§ 866, upon which the application was based, is as follows:

> In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage. * * *

It is submitted that the statute does not permit the issuance of a *dedimus potestatem* in a criminal case; and that if it did, the action of Judge Butler is not reviewable.

(1) *A dedimus potestatem can be issued in civil causes only.*

The provision is taken from the Judiciary Act of September 24, 1789, c. 20, § 30. That section, after providing at great length for depositions *de bene esse*, contains the following proviso:

> *Provided*, That nothing herein shall be construed to prevent any court of the United States from

> granting a *dedimus potestatem* to take depositions according to common usage when it may be necessary to prevent a failure or delay of justice, which power they shall severally possess. * * *

The main provisions of this section with relation to depositions *de bene esse* are expressly confined to civil causes. It is therefore to be presumed, the statute being one drafted with great care, that the proviso is likewise confined to civil causes. (*Wayman* v. *Southard*, 10 Wheat., 1, 30; *Minis* v. *United States*, 15 Pet., 423, 445; *Voorhees* v. *United States Bank*, 10 Pet., 449, 471; *The Irresistible*, 7 Wheat., 551; *City of Chicago* v. *Phœnix Ins. Co.*, 126 Ill., 276; *Wolf* v. *Bauereis*, 72 Md., 481, 485.)

The act does not provide a complete system of pleading and practice. It assumes that the pleading and practice then known to "common usage" shall continue; and the proviso was not inserted for the purpose of providing a new remedy, but for the purpose of avoiding any inference that an existing remedy was taken away. The right to issue a *dedimus potestatem* after 1789 still continued to be governed by former usage, and did not become in the proper sense of the term a statutory right.

In an early case this court ruled that the words "common usage" applied in each State to the usages of that State, including those dependent upon its legislative acts. (*Buddicum* v. *Kirk*, 3 Cranch, 293.) This case arose in that part of the District of Columbia which was formerly contained within the limits of the State of Virginia; and the *dedimus potestatem* was held to be governed by a Virginia statute. That statute was adopted in 1792 (Virginia

Code, 1802, p. 279), but was a mere copy of an act of 1788 (12 Hening, Stat. at Large, 747). The decision therefore throws no light on the question whether the phrase "common usage" applies only to the usage of 1789, or whether it intends to adopt in each State its subsequent statutory provisions as from time to time they are enacted. The former view was adopted by Judge Choate in *United States* v. *Pings*, 4 Fed. Rep., 714, 716. (See *Bischoffscheim* v. *Baltzer*, 10 Fed. Rep., 1; *United States* v. *Parrott*, McAll., 447, 456.)

Whatever may be the rule in civil cases, it is respectfully submitted that no changes in criminal practice by State legislation could affect the Federal procedure. It has been laid down in the strongest terms that criminal procedure in Federal courts is not governed by the express provisions of the Judiciary Act, or by any State legislation subsequent to 1789, but that as to each of the thirteen original States the criminal procedure as it existed in that year must govern, except so far as it may be affected by subsequent Federal statutes. (*United States* v. *Reid*, 12 How., 361, 363, *per* Chief Justice Taney; *Logan* v. *United States*, 144 U. S., 263, 300–1; see *Bucher* v. *Cheshire R. R. Co.*, 125 U. S., 555, 582; *United States* v. *Insley*, 12 U. S. App., 125, 130; *United States* v. *Hall*, 53 Fed. Rep., 352.) The courts had no power at that time in any of the States to order the taking of depositions in criminal cases. Even, therefore, could the proviso in § 30 be construed as broader in scope than the provisions to which it was appended, it could have had no practical application in criminal procedure.

In *United States* v. *Cameron*, 5 McCrary, 93, it was held that § 866 of the Revised Statutes, being affirmative in form, and not a mere proviso, was broader in its application than the Judiciary Act, and was intended to adopt the usage, common law and statutory, of each State as it existed in 1874 when the revision was made. A *dedimus potestatem* was therefore held to be proper under the Missouri practice. Similar changes in language are not infrequent in the Revised Statutes, turning the provisos of earlier legislation into affirmative enactments. The presumption is always that the revisers did not intend to change the prior law (*United States* v. *Le Bris*, 121 U. S., 278; *McDonald* v. *Hovey*, 110 U. S., 619, 628; *United States* v. *Ryder*, id., 729, 740), unless their language revision is so clear as to admit of only one construction, as in *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S., 1, 39.

It is not necessary, however, to discuss the case of *United States* v. *Cameron*, because the State of Pennsylvania has never introduced the writ of *dedimus potestatem* or anything similar into its criminal procedure.

(2) *Were it possible for the court to grant the dedimus potestatem in this case, the application would be addressed to its discretion, and therefore its action would be unreviewable.*

In § 866 the language is that the court "may grant," etc. This is clearly one of those applications which are unreviewable upon writ of error. (*Goldsby* v. *United States*, 160 U. S., 70, 72, 73.)

Indeed, there was no way in which Judge Butler could have granted relief to Keck in this manner except by refusing to try the case unless the District Attorney consented to some method for taking depositions abroad, as was done in the case referred to by Lord Mansfield in *Mostyn* v. *Fabrigas*, 1 Cowp., 161, 174, where in a criminal prosecution for a pension fraud the defendant's witnesses being all in Scotland, the court refused to try the case until the prosecutor consented "that the witnesses may be examined before any of the judges of the Court of Session or any of the barons of the Court of Exchequer in Scotland, and that the depositions so taken should be read at the trial." It will be perceived from the form of this order that there was no established practice like that of a *dedimus potestatem* to which the court were able to refer, but that a practice was contrived to fit the case.

In *United States* v. *Wilder*, 4 Woods, 475, referred to by Keck's counsel, the judge granted a *dedimus potestatem* in a smuggling case, but reserved the question of admissibility of the evidence to the trial, stating that according to his information the practice was prevalent in the State courts in Georgia, and that if the testimony were inadmissible before the jury, he would consider the evidence thus obtained when he came to sentence the prisoner.

It seems to have been with such cases as these in mind that Judge Butler pronounced the application too late. Had there been any "common usage" in Pennsylvania by which a prisoner could apply for a *dedimus potestatem*, it might have been inapplicable until after indictment. As, however, the application was simply addressed to the

sympathy of the court and could be made of practical value only by some such method as that described by Lord Mansfield, the prisoner could make his application as well in February as in May. Had the application been made promptly, a month or more before the term, it might have been proper for the judge to require the District Attorney to waive all objections on pain of indefinite postponement of the trial; but he would doubtless have required a counter-stipulation on the part of the prisoner to waive objections to the taking of depositions also on behalf of the Government. This would have been only fair, and rights based upon the Constitution, as well as those based upon mere statutes, may be waived—the right to be confronted with witnesses included. (*United States* v. *Loughery*, 13 Blatchf., 267; *People* v. *Guidici*, 103 N. Y., 500, 508; *Reynolds* v. *United States*, 98 U. S., 145, 160; *United States* v. *Gale*, 109 U. S., 65; *Matter of Cooper*, 93 N. Y., 507; 1 Bish. New Crim. Proc., § 1205.)

V.

The rulings upon points of evidence were correct.

Questions of relevancy arising upon offers of circumstantial evidence are largely within the discretion of the trial judge, whose rulings in admitting such testimony (*Moore* v. *United States*, 150 U. S., 57; *Thiede* v. *Utah*, 159 U. S., 510, 518; *Goldsby* v. *United States*, 160 U. S., 70, 73) or excluding it (*Alexander* v. *United States*, 138 U. S., 353) are not reviewable, at least except for a clear abuse of discretion.

Defendant objects to the admission of the testimony that Captain Loesewitz gave Treasury Agent Gallen so good a description of Keck that Gallen was enabled to pick him out among a large crowd of people by the description (pp. 46–7). It is suggested that this evidence is hearsay. It would be hearsay if its object were to establish for the benefit of the jury the true description of Keck's personal appearance. This was not the object, however. Keck was sitting in the court room, and the jury were able to judge of his personal appearance by their own inspection. The important fact was not that Keck's appearance was so-and-so, but that the captain had stated it to be so-and-so. It will be remembered that he was unable to remember Keck's name. His ability to describe Keck's appearance was, therefore, of very great weight as confirming the accuracy of his own story. If he had been engaged in smuggling for the benefit of somebody else, and had concocted this story for the purpose of transferring the blame to Keck, he would have been able to remember Keck's name. The fact, therefore, that he was able to describe Keck, although unable to name him, was one of very great importance in the case.

Defendant also objects to the exclusion of his own offer to prove that Mr. Keck's firm imported only rough diamonds; the object of this evidence being "to show there was no motive on the part of these gentlemen to smuggle this stuff in" (p. 93). A man engaged in diamond cutting as a business is very familiar with the state of the cut diamond market in this country. He is thus

constantly aware of the immense profit obtainable by successful smuggling these articles. The fact that a man is engaged in a legitimate business can have no weight in his own behalf upon a charge of crime. He might as well have offered to prove that he was in the lager beer business or the umbrella business. The offer to prove that he was in the diamond cutting business only tended, for the reasons above stated, to prove that he was under peculiar temptation to smuggle. Indeed, Keck admitted that he was importing cut diamonds for another of his firms during the same month (p. 96).

Objection is also made to the exclusion of proof that for a year prior to January 27, 1896, "the name of F. Van Reeth frequently appeared in the public prints of Antwerp referred to by Captain Loesewitz in his testimony, and that it was well known through the public prints and by the knowledge that the people of Antwerp obtained that Mr. F. Van Reeth went to Cincinnati to engage in the diamond business" (p. 84). It is hardly necessary to discuss this objection, especially since the captain, although a native of Antwerp, was running a steamer between New York and Liverpool, seldom read the Antwerp papers, and had testified on cross-examination that he had never seen the particular paper referred to by defendant's counsel (pp. 38–9).

VI.

No prejudicial error can be found in the court's instructions to the jury, or in the refusal to instruct as requested by defendant.

Defendant first excepts to the charge "that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here is true, the defendant is guilty of the offense charged" (p. 112). This is substantially equivalent to charging that if the Government testimony is true, the defendant is guilty of the offense charged; and so far as it might tend to confine the jury's attention to the captain's testimony as representing the Government case, it would not be prejudicial to defendant. The court, however, went on to discuss the other testimony to some extent, and left the whole case to the jury. Defendant objects in his brief that "there was nothing said at the *Café Alsacienne* as to smuggling of the diamonds or omitting to submit the same to the officers of the revenue for inspection of the same after the arrival of the ship in port." In other words, he objects that his (Keck's) own intent to defraud was not expressly testified to by the captain. The intent to defraud was, however, an absolutely unavoidable inference from Keck's conduct at Antwerp as described by the captain. Who would ever have entrusted a $6,000 box of diamonds to the most trustworthy person, without telling him of its value, except for some very controlling reason? And what possible reason could exist for doing so in the present case except the desire to induce the captain to send along the package without invoicing, manifesting, declaring, or exhibiting it?

Moreover, it is a misdemeanor under this section of the statute either to smuggle goods or to clandestinely introduce them. The words "clandestinely introduce" must

be construed as having a meaning of their own, since "a statute ought upon the whole to be so construed that if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant." (*Market Co.* v. *Hoffman*, 101 U. S., 112, 115–16; *Rice* v. *Railroad Co.*, 1 Bl., 358, 378–9.) The meaning and intent of these words is clear. They are intended to enlarge the meaning of the statute and make its provisions the more safe from evasion, somewhat as the words "and enterprise" are employed to give a wider scope to the provision against military expeditions. (*Wiborg* v. *United States*, 163 U. S., 632, 650.) ~~Intent to defraud may be a difficult thing to prove. A mere clandestine introduction of goods is therefore made likewise a misdemeanor, punishable under the same statute.~~

It is a crime to "clandestinely introduce into the United States any goods, wares, or merchandise subject to duty by law and which should have been invoiced, without paying or accounting for the duty." When the captain of a steamer imports goods belonging to another man without putting them upon the manifest, the importation is clandestine, and when the vessel enters a port of entry, they are clandestinely introduced into the United States. Can there be the slightest claim that Keck intended the goods to be put upon the manifest? In that case he would have shipped them in the usual manner, and would not have left them in the hands of a man unacquainted with their value.

It was not necessary for the court to explain the statutory provisions fully, because this appears already to have

been done by counsel; and as the court does not specify which counsel, it may be presumed that there was no controversy at the bar as to their true interpretation.

The court charged as requested upon the subject of reasonable doubt (pp. 111–12). Its further comment on the interpretation of this request to charge is sufficient to fulfil the requirements of the law. (*Dunbar* v. *United States*, 156 U. S., 185, 198.) Here again defendant complains of the court's reference to the testimony of Captain Loesewitz; and here again we answer that, if it tended to confine the jury's attention to the captain's own testimony as distinguished from the Government's case in general, it did not thus prejudice the prisoner.

VII.

The sentence appears to be erroneous under § 5541 of the Revised Statutes and *In re Bonner*, 151 U. S., 242, as claimed by defendant. It seems, therefore, necessary to remand the case to the District Court with instructions to enter a valid judgment upon the second count of the indictment, as was authorized in that case and done in *Ballew* v. *United States*, 160 U. S., 187. The District Court will be able easily to remedy the error by making the term of imprisonment a year and a day instead of a year simply.

EDWARD B. WHITNEY,
Assistant Attorney General.

No. 551. Sup. Ct. 1896.
Sup. Ct. Dec. of Atty. for Def. in Error

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In the Supreme Court of the United States.

OCTOBER TERM, 1896.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 551.

SUPPLEMENTARY BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 551.

SUPPLEMENTARY BRIEF FOR DEFENDANT IN ERROR.

Plaintiff in error (Record, p. 46) objected to a certain question without stating any ground of objection. His present point—that it referred to a conversation too late to be part of the *res gesta*—was clearly not caught by the trial judge, as appears by the latter's remark just prior to the question. The conversation, indeed, was no later than one of those held competent in *Insurance Co.* v. *Mosley*, 8 Wall., 397, 399, 404, and case cited at p. 407. (See also 1 Whorton on Evidence, § 261.)

In the haste with which the brief had to be written, the undersigned failed to call attention to certain defects in the time and manner of objecting, which he now respectfully asks the court to notice.

The smuggled diamonds in question having been seized at Philadelphia in the hands of Capt. Loesewitz, the prosecution's main witness, the captain, on the day after the seizure, told Mr. Gallen, a Treasury agent, that he got them from a man in Antwerp. At the time of seizure he had said nothing. The following occurred on the trial during the direct examination of Gallen (pp. 45–6):

By the DISTRICT ATTORNEY:

Q. Did he say whether he knew what was in the package?

A. He said he didn't know what was in the package.

Q. Did he say anything when the box was opened and the diamonds displayed?

A. He said he didn't know the contents of that package.

Q. What took place next day?

A. The next day he called at my office, and I asked him if he had any explanation to make.

(Objected to.)

The COURT. His declarations can not be used against the defendant. What this man said when the diamonds were first found upon him might be evidence as part of the *res gesta*, and it would be safe to admit it, but what he said afterward certainly is not evidence against this defendant.

By the DISTRICT ATTORNEY:

Q. Did the captain give you a description of the man who gave the diamonds to him?

(Objected to. Objection overruled. Exception allowed for defendant.)

A. Yes, sir.

Q. What was the day when he gave you the description?

A. The day after I seized the diamonds.

Q. What was the description that the captain gave of the man whom he alleged gave him, the captain, the diamonds?

A. He described him as a man about the size of Collector Reed, not quite as stout, a small, reddish-brown mustache, small features, small eyes, and blonde complexion.

By the COURT:

Q. Did he name the man?

A. No, sir; he could not give me his name.

Q. That is, he did not remember it?

A. He did not remember it.

Mr. Gallen further testified that, a day or two later, he identified defendant from this description (pp. 46–7).

In criminal, as in civil cases, an objection must be made sufficiently specific to enable the trial judge to rule upon it intelligently. "The only objection consists of the two words 'objected to.' A mere objection where no grounds for it are assigned at the trial can not be considered in an appellate court." (*United States* v. *Shapleigh*, 12 U. S. App., 26, 46.)

The rule is long settled in the Federal courts (*Burton* v. *Driggs*, 20 Wall., 125, 133; *Toplitz* v. *Hedden*, 146 U. S., 252, 255; *Wood* v. *Weimar*, 104 U. S., 786, 795; *Charleston Co.* v. *Joyce*, 8 U. S., App. 309 and cas. cit.; *Walsh* v. *Colclough*, 9 id., 537, 545; *Ward* v. *Manuf. Co.*, 12 id., 295, 303). Authorities to the same effect in State courts are cited in large numbers in 1 Thompson on Trials, § 693, and Elliott's Appellate Procedure, § 779.

One reason for this rule is that the trial judge may not be misled. Sometimes an objection is argued at *nisi prius*

on an insufficient ground, a sufficient ground being wholly overlooked. It appears in the record as "objected to." Very often an objection is thrown in without any known ground, in hopes of discovering something to support it pending appeal, and thus obtaining a new trial with consequent long delays, when the objection, if made specific, would have been sustained. *Interest reipublicæ ut sit finis litium.* Hence the above rule.

It is impossible to tell what ground of objection, if any, was in the minds of court or counsel. It is probable that counsel had no definite point in mind, else he would have renewed the objection later on. The question to which he did object merely asked whether—time not specified—the captain had given Mr. Gallen a description of Keck. The court had already stated that all declarations of the captain after the first interview were incompetent against the defendant, but the mere incident that the captain gave a description of Keck was proper enough to admit. Such incidents are commonly admitted in evidence, leaving counsel to put in their objections if the line of testimony is followed further. The time to object was when the description was called for, or when Mr. Gallen subsequently testified that he identified Keck by the description.

At neither of these times did defendant object. By permitting the question "What was the description," &c. (there being no claim that the permission was by inadvertence), he lost his right to object to the answer. By a well-known rule a party can not stand by and see whether an answer will be favorable, and then, if unfavorable,

endeavor on appeal to remedy his mistake in speculation; or if, as often happens, he is trying for effect on the jury by waiving all technicalities, he has no right to insist on the technicalities afterwards.

Assuming the description, and Mr. Gallen's subsequent recognition of Keck therefrom, to have been objectionable, had they been objected to, yet the general rule which would have excluded them would have imported no unfairness in this particular case. There is every indication of entire good faith on the captain's part in giving the description of the man whose name he had forgotten. No real injustice would be done defendant by holding him to a rule of practice as strict as the rule of evidence to which he now seeks to appeal.

In order to sustain his objection, counsel seeks to connect it with a clause in the charge to which also he failed to object at the time; but there is nothing in the record to show that this particular piece of corroborative testimony is one of those to which the court alluded.

It is, however, a matter of constant experience at trials that matters which under strict rules are incompetent come in through failure of counsel to object, and even turn out to be of supreme importance in the case. Their entrance into the case is one of the chances of war, of which plaintiff and defendant run equal risks, and both sides are skirmishing throughout the trial to get them in. They are usually, as here, matters which are not intrinsically unfair, and not such as the rules of evidence were especially intended to bar out. Had they been,

opposing counsel would instinctively have perceived their objectionability and would have seasonably objected.

It is respectfully submitted that it is worse to reverse than to affirm in one of these cases.

EDWARD B. WHITNEY,
Assistant Attorney General.

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OCTOBER TERM, 1897.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 194.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR UPON REARGUMENT.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 194.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANT IN ERROR UPON REARGUMENT.

Although it was suggested in the former brief on behalf of the United States that the first count of the indictment is substantially in a form held insufficient in certain adjudged cases, it may not be improper, now that a reargument of the case is directed by the court, to discuss the sufficiency of that count, in view of the fact that the former brief was addressed principally to questions arising under the second count.

ADDITIONAL STATEMENT AS TO FACTS.

On page 9 of the original brief for the defendant in error, it is stated that the defendant was brought before

the United States commissioner on February 18, 1896 (Rec., p. 11), and that the date given by Captain Loesewitz, the witness for the Government, namely, March 18 (Rec., p. 28), seems to be an error. The fact is that there were two hearings. At the first, on February 18, the defendant was held for further hearing, and at the second, on March 18, he was identified by Captain Loesewitz and remanded to await the action of the grand jury. It is therefore true, as claimed by the plaintiff in error, that the captain produced the paper given to him by Keck in Antwerp, containing Van Reeth's address (Rec., pp. 50, 51), at the later hearing.

In the statement of the case on behalf of the plaintiff in error (Revised Brief, pp. 8, 9), the following account is given of the testimony of Captain Loesewitz regarding his disposition of the package containing the diamonds and the paper bearing Van Reeth's name and address:

> Witness put the package and paper in his pocket, and after being at the café a quarter of an hour, the three separated on Place Verte, where Mr. Keck told witness to send the package by Adams Express. Witness sailed from Liverpool on January 29, and put the package in his stateroom and the paper in a card case in his pocket. Witness never put the package and slip of paper with the address on it together (original Rec., p. 78; printed, p. 34), but wrote the address on package himself (original Rec., p. 78; printed, p. 34), although package seized by officer had no address on it.

There are frequent references throughout the revised brief of plaintiff in error to this subject, and attention is called to the fact that the captain testified that the pack-

age given him in Antwerp had upon it an address, which he wrote thereon himself, while the package seized by the revenue officer had no address upon it (e. g., pp. 62, 63, 118, 130, revised brief). There is no doubt that the package had no address upon it when seized, but it is respectfully submitted that the testimony explains the discrepancy between this fact and the fact that the captain wrote the address upon the package himself.

On page 26 of the record Captain Loesewitz testified as follows:

> Q. I hand you a package, and ask you to look at it and tell me whether or not that is the package which was handed to you by Von Hemmelrick with the statement that it belonged to the defendant, Herman Keek?
>
> A. That is the package.
>
> Q. Was it in the shape, with respect to the seals and binding, that you now see it?
>
> A. It was in the same shape, *only the paper got torn off.* At that time the paper was right out and had those seals on *and no writing on it.*

On page 34 the same witness, under cross-examination, testified as follows:

> Q. Where did you put the package—in your pocket, loose?
>
> A. I put it loose in my pocket.
>
> Q. Where did you put the paper?
>
> A. Along with it; along with the box.
>
> Q. Loose?
>
> A. Along with the box.
>
> Q. You never tied the paper to it?
>
> A. No, sir.

* * * * *

By Mr. SHIELDS:

Q. You put that address loose in your pocket without attaching it to the package in any way?

A. Yes, sir.

Q. When you got aboard the ship where did you put the package?

A. In the drawer.

Q. Where did you put the paper?

A. *Afterwards* I put it in a little case.

Q. In a pocketbook or something of that kind?

A. Yes, sir; in a pocketbook.

By the court:

Q. Why did you not put the paper containing the address on the package? Why did you keep them separately?

A. *I kept that and put it afterwards with the package in another paper, and wrote the address on myself.*

Q. How is that?

A. I left off the address besides, and it was my minding to wrap that package in another paper when I arrived here, and then put the address on it. I intended to do that.

Q. Why did you not fasten the address and the package together?

A. Because I put it in my pocketbook—that address; *I did not do that at the time.*

This testimony shows that what the captain really did was to receive the package and the card, and to wrap them soon after their receipt together in one cover, upon which he wrote the address. Subsequently he took off that wrapping and put the original package without an address in a drawer in his stateroom, and the card or paper containing the address in a case or pocketbook.

Although there is some confusion in the details of this testimony, it is fair to conclude, under all the circumstances, that the apparent discrepancy as to the address is explained by these statements, showing that the captain at first wrapped the package and the card together and wrote the address on that outside covering, and afterwards took off that wrapping and placed them, separately, the one in a drawer and the other in his case or pocketbook, intending upon arrival here again to wrap the package in another paper and forward it to its destination.

ARGUMENT.

I.

The first count of the indictment is good.

The first count in the indictment is as follows:

> The grand inquest of the United States of America, inquiring in and for the eastern district of Pennsylvania, upon their respective oaths and affirmations, respectively do present that heretofore, to wit, upon the 11th day of February, in the year of our Lord one thousand eight hundred and ninety, one Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, willfully, and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit: Into the port of Philadelphia certain goods, wares, and merchandise, to wit, five hundred and sixty-three diamonds of great value, to wit, of the value of ten thousand dollars, contrary to law and the provisions of the act of Congress in such cases made

> and provided, with intent to defraud the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

It is based upon section 3082 of the Revised Statutes, which makes it criminal "if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise contrary to law." * * *

The Government admits the qualification imposed upon the rule that it is generally sufficient in framing an indictment under a statute to follow the statutory language, as stated by this court through Mr. Justice Harlan in *United States* v. *Simmons* (96 U. S., 360, 362) and followed in subsequent cases, viz:

> Where the offense is purely statutory, having no relation to the common law, it is "as a general rule sufficient in the indictment to charge the defendant with acts coming fully within the statutory description in the substantial words of the statute, without any further expansion of the matter." (1 Bish. Crim. Proc., sec. 611 and authorities there cited.) But to this general rule there is the qualification fundamental in the law of criminal procedure that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute.

But where the statutory language individuates the offense or the lack of particularity may properly be supplied by a bill of particulars, the general rule should be

the guide. In the case at bar we contend that the first count is good on these grounds.

Section 3082, Revised Statutes, was taken from the act of July 18, 1866 (14 Stats., 178). That act was entitled "An act further to prevent smuggling, and for other purposes." Although the language of the act may be held to include forms of importation contrary to law other than smuggling, that was the particular form of unlawful importation which was aimed at. It was so considered in the case of *United States* v. *Kee Ho* (33 F. R., 333). In this case the indictment was found under section 3082, and the court, Deady, J., says (foot of p. 334):

> The section of the statute under which this indictment is drawn is intended, as the title of the act from which it is compiled indicates, to prevent smuggling—the clandestine introduction of goods into the United States without passing them through the custom-house and with intent to defraud the revenue of the United States.

It is true the court further holds that the language of the act is broad enough to include other forms of illegal importation, which conclusion will be considered later. This decision was subsequent to the revision of the statutes, and the court apparently proceeds on the theory that the language of section 3082 is doubtful, and therefore may be subject to explanation by the original act.

The circumstances under which the courts may look at prior laws for which a revision is substituted are stated in *United States* v. *Bowen* (100 U.S., 508, 512–514), and *Bate Refrigerating Co.* v. *Sulzberger* (157 U. S., 1–39).

We contend that there is here such substantial doubt as to the meaning of the language used in the revision that the old law is a valuable and proper source of information. Importing contrary to law may include so many illegalities concerning the revenue that we may well assume that Congress had a definite offense in mind in framing this criminal statute, and properly look to the original law, as explained by its title, to learn what that was. Section 3082, therefore, by its language indicates smuggling as the offense described. Other forms of importing contrary to law, such as importing prohibited merchandise or in prohibited packages, could not properly have been embraced in this indictment, and defendant could not have been misled as to said charges by the use of the statutory terms. The importation of diamonds is not prohibited nor is any special form of package prescribed for their due entry. Similarly, the omission of goods from a manifest or the failure to produce a duly certified invoice could not have been covered by this count so as to mislead the defendant and prevent his proper preparation for trial, because the penalties prescribed for the omission of goods from a manifest, under sections 2809 and 2814, Revised Statutes, are directed against the master of the vessel and the goods; and while it is true that under section 2865 one of the elements of the crime of smuggling, as there described, is that the goods shall be such as should have been invoiced, and section 4 of the act of June 10, 1890 (26 Stat., 131), requires generally the production of a duly certified invoice before goods shall be admitted to

entry, nevertheless the mere omission of an invoice does not constitute a crime liable to punishment, and therefore the defendant could not have been charged with this offense under this count.

The offense committed, therefore, was described with reasonable certainty within the requirement of the rule. The averments of name, time, the quantity or number and character of the goods, were given with sufficient particularity, and the charge in the statutory language, or substantially so, of importation contrary to law apprised the defendant that the charge was for the definite and individuated crime of smuggling. The facts in detail were properly a matter of evidence, or they should have been called for by bill of particulars.

It is true that in the cases of *United States* v. *Kee Ho* (33 F. R., 333), *United States* v. *Claflin* (13 Blatchf., 178), and *United States* v. *Thomas* (4 Ben., 370) similar indictments were condemned.

It is respectfully submitted that we have in these cases, upon facts similar to the present case and similar to each other, two different and inconsistent rulings. In the Kee Ho case the court held that the particular averments might be rejected as surplusage, and then the indictment was bad for generality. In the Thomas case the court held that the particular averments could not be rejected as surplusage, and, as they did not constitute a crime, vitiated the indictment, although of opinion that if the indictment had been in general form it would nevertheless not have been good. In view of the dilemma suggested by these cases and the danger of particular averments thus illustrated, a pleader may well be justified in

relying on the general language of the section and in awaiting an order for a bill of particulars before stating the particular facts. These rulings and the considerations suggested by them were in all probability in the mind of the court below in sustaining this count of the indictment. They properly call for the application of the general rule permitting the statutory language under section 3082. These cases are referred to thus fully to point out the dilemma which they may have suggested to the pleader. But we contend that they are no longer of authority, but have been overruled by *Dunbar* v. *United States* (156 U. S., 185).

Considering now some of the recent cases decided by the court, in which it is held that more particular averments than the mere statutory language are requisite, in the case of *United States* v. *Cruikshank* (92 U. S., 542, 557) the court says:

> According to the view we take of these counts, the question is not whether it is enough in general to describe a statutory offense in the language of the statute, but whether the offense has here been described at all. The statute provides for the punishment of those who conspire to injure, oppress, threaten, or intimidate any citizen with the intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States. These counts in the indictment charge in substance that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of every, each, all and singular the rights granted them by the Constitution, etc. There is no specification of any particular right. The language is

> broad enough to cover all. * * * In Maine it is an offense for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the State prison; but we think it will hardly be claimed that an indictment would be good under this statute which charges the object of the conspiracy to have been "unlawfully and wickedly to commit each, every, all and singular the crimes punishable by imprisonment in the State prison." All crimes are not so punishable. Whether a particular crime be such a one or not is a question of law.

and the court conclude that the counts are too vague and general.

The case at bar, however, is not justly subject to the criticism of this case. The averments of time, place, person, and merchandise were duly made, and the only importation contrary to law of which the defendant could have been apprised under the indictment was the very offense charged, the further particulars of which could properly have been obtained by a bill of particulars. In the Cruikshank case the averments went beyond the statutory language in this respect, that they emphasized the generality of the charge and on that ground were regarded as too vague and lacking the certainty and precision required by criminal pleading. Strictly speaking, the decision does not condemn the use of the exact statutory language.

In *United States* v. *Mann* (95 U. S., 580, 586) it was held that the right conferred upon an officer under section 3177, Revised Statutes, to enter a building where articles subject to tax are made, produced, or kept, is strictly limited to such a building, and that paid bank

checks are not articles subject to taxation within the meaning of the section, unless it is alleged and proved that they were not duly stamped at the time they were made and issued, and for this reason the court concludes that the information does not set forth any legal offense. Here, as in the next case, an essential element of the crime was omitted. The statutory language was really not followed.

In *United States* v. *Carll* (105 U. S., 611) the indictment for uttering a counterfeit omitted to allege the knowledge of the defendant that the instrument was counterfeit, which is essential to make out that crime, and upon this ground it was held that the omission was a matter of substance and that the indictment was not sufficient.

In *United States* v. *Hess* (124 U. S., 483) the indictment was founded upon Revised Statutes, 5480, and alleged the unlawful use of the mails. The court held that the offense is not described with sufficient particularity under the section in question, and that the omission is a matter of substance and not of form, and therefore is not cured by the verdict. It is to be noticed here that although a scheme to defraud was alleged, no particulars of the alleged scheme were given, upon which the court held that the indictment was as insufficient as would be an indictment for larceny without stating the property stolen, or its owner, or the party from whose possession it was taken.

In *Pettibone* v. *United States* (148 U. S., 197) the indictment was, under sections 5399 and 5440, for corruptly endeavoring to influence an officer and for conspiracy.

The court remanded the cause with instructions to quash the indictment upon the ground that the acts constituting the conspiracy were not properly averred, in that it omitted the averment that the purposes of the confederation was the interruption of the course of justice in a United States court, and that the indictment did not charge that the defendants were ever served with process or otherwise brought into court. The court held (p. 209) that the unlawful act charged was not an offense against the United States, so that if the defendants were held guilty their conviction would rest upon a conspiracy to commit an act unlawful in another jurisdiction and itself a distinct and separate offense therein, and therefore to convict defendants of conspiracy to obstruct the administration of justice in a United States court because they were guilty of a conspiracy to commit an unlawful act as against the State, the evil intent presumed to exist in the latter case must be imputed to them, although ignorance would otherwise have constituted a defense, and the intent related to a crime against the State. The burden of the decision is that the indictment is defective because it does not really allege an offense against the United States. That is not the fact in the present case because to "import contrary to law" aptly describes an offense against the United States.

In *Blitz* v. *United States* (153 U. S., 308) the defendant was charged with knowingly personating and voting under the name of another at an election at which a Representative in Congress and also State officers were to be elected, and it was held that the indictment was fatally defective because it failed to charge clearly that the accused did vote

as a matter of fact for a Representative in Congress. The words of the indictment left it in doubt or to mere inference whether the offense charged was one within Federal cognizance. The court, page 315, states the general rule that an indictment for an offense purely statutory is sufficient if it pursues substantially the words of the statute, subject to the qualification that the accused must be apprised with reasonable certainty of the nature of the accusation against him, and proceed to say:

> The want of care in framing the first count is further shown by the fact that, although voting and attempting to vote knowingly in the name of another for Representative in Congress may be distinct offenses under the statute, the indictment charges that the defendant did knowingly personate and vote and attempt to vote in the name of another person. If the attempt to so vote was immediately followed by voting, then the allegation that the accused attempted to vote was unnecessary. The first count leaves it in doubt whether it was intended to charge two distinct offenses, or only the offense of voting in the name of another person.

The gist of this defect in the indictment was that it stated too much and left it uncertain whether one or the other or both of two charges possible under this section of the statute were made against the defendant.

The defect in this count of the indictment in the case at bar, if one exists, is matter of form, which can not be availed of by reason of section 1025, Revised Statutes, which provides, that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant.

The language of the court in *Connors* v. *United States* (158 U. S., 408, 411) is applicable to this case. In that case there was an indictment for the crime of having interfered with the officers of election in the discharge of their duties, in language describing the mode of committing the offense, "perhaps with unnecessary particularity." The court (p. 411) held that it was in the discretion of the court below to compel the prosecutor to state upon which form of the charge he would proceed; but as a proper motion for this purpose was not made, and this objection was urged for the first time after verdict, it is not available on a writ of error, and the court proceed (p. 411):

> Nor, if made by demurrer or by motion and overruled, would it avail on error unless it appeared that the substantial rights of the accused were prejudiced by the refusal of the court to require a more restricted or specific statement of the particular mode in which the offense charged was committed. There is no ground whatever to suppose that the accused was taken by surprise in the progress of the trial, or that he was in doubt as to what was the precise offense with which he was charged.

So in this case, where no application was made asking for a more specific statement of the particular mode in which the offense was committed, and as there is no doubt as to what the precise offense was, because the statutory averments sufficiently describe it, it should be held that section 1025 applies, since the defect is in matter of form not tending to the prejudice of the defendant.

In *Evans* v. *United States* (153 U. S., 584), in which the indictment was for embezzling the funds of a

national bank, various counts were objected to on the ground that they were not sufficiently specific. The court say (p. 590):

> While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty as well as to shield the innocent, and no impracticable standards of particularity should be set up whereby the Government may be entrapped into making allegations which it would be impossible to prove.

And again on page 594:

> This subject, however, was so fully considered by this court in United States *v.* Simmons (96 U. S., 360, 364), that it is needless to dwell upon it more at length here. In that case the indictment averred that the defendant "did knowingly and unlawfully engage in and carry on the business of a distiller * * * with intent to defraud the United States of the tax on the spirits distilled by him." It was held not to be necessary to state the particular means by which the United States was to be defrauded of the tax. "The defendant," said the court, "is entitled to a formal and substantial statement of the grounds upon which he is questioned, but not to such strictness in averment as might defeat the ends of justice."

This ruling aptly applies to the case at bar. It is not necessary to state in the indictment the particular means by which the illegal importation was accomplished.

But if the language of the first count is too general, the defendant's remedy was by bill of particulars.

The general principles upon which a bill of particulars is ordered are as follows:

A bill of particulars should be applied for whenever the indictment is so general as to give to the defendant inadequate notice of the charge he is expected to meet, and upon application the court will require the prosecution to furnish a bill of particulars for the specific charge to be pressed or the evidence intended to be relied upon. (Whart. Crim. Pl. and Pr., 9th ed., sec. 702.) It is there stated that indictments may be thus general and yet in entire conformity with precedent, and hence has arisen the practice of requiring bills of particulars in such cases. The adoption of such bills, instead of exacting increased particularity in indictments, is productive of several advantages, e. g., it prevents much cumbrous special pleading and consequent failure of justice, and gives the defendant in plain and unartificial language notice of the charge he has to meet.

> An indictment which the court can not pronounce ill may still omit details to which the defendant is justly entitled before trial. Thereupon the judge, if applied to, orders a written specification of things, called sometimes, and perhaps generally, a bill of particulars, to be filed with the papers in the cause, and on the trial restricts the prosecuting officer in his evidence to the items therein set down. (1 Bishop's New Criminal Procedure, sec. 643.)

There are no unvarying rules requiring particulars in one class of offenses and not in another, and no consid-

erations can be advanced why the practice should not be pursued in offenses under revenue laws as well as in conspiracy or embezzlement. Indeed, since the former offenses are especially secret in their nature and methods, the prosecution should be allowed with great reason to state the offense in the statutory language, and await an application for particulars in which to give the special facts. This does not hinder or embarrass the prosecution, and yet preserves the substantial rights of the defendant. Nor would this substitute "indictment by the district attorney" for indictment by the grand jury, as suggested by the learned counsel for the plaintiff in error.

In *Ex parte Bain* (121 U. S., 1), cited by him, there was no question as to a bill of particulars, but it was held that after an indictment is filed no change can be made in the instrument by order of the court or by the prosecuting attorney without resubmission to the grand jury. A bill of particulars, it is true, is not a substitute for a necessary averment, nor can it supply a defect in substance in the indictment. But we hold that in this case the defect, if any exist, is not in matter of substance, but of form, which can properly be supplied by a bill of particulars. All the necessary averments as to time, place, and merchandise were made with sufficient particularity, and the only information necessary to be elicited by a bill of particulars was the facts in which the illegal importation consisted. The pleader was justified, in view of the strictness of proof required, in withholding these allegations from the count. It was

an indictment which the court could not pronounce ill, and as to which it doubtless was prepared to order the particulars upon due application.

In cases not to be distinguished on principle from the one at bar, this court has held or suggested that an application for a bill of particulars would have been the proper course.

In *Durland* v. *United States* (161 U. S., 306) the indictment charged the use of the mails with intent to defraud. It partially identified certain letters, but did not give their contents. The court say (p. 315):

> It may be conceded that the indictment would be more satisfactory if it gave more full information as to the contents or import of these letters, so that upon its face it would be apparent that they were calculated or designed to aid in carrying into execution the scheme to defraud. But still we think that as it stands it must be held to be sufficient. There was a partial identification of the letters by the time and place of mailing, and the charge was that defendant, "intending in and for executing such scheme and artifice to defraud, and attempting so to do, placed and caused to be placed in the post-office," etc. This, it will be noticed, is substantially the language of the statute. If defendant had desired further specification and identification, he could have secured it by demanding a bill of particulars.

In commenting on the Durland case in reference to the second count of the indictment the learned counsel for plaintiff in error says (revised brief, p. 45):

> The indictment identified the letters, but did not give their full contents. The court properly held that the contents should have been obtained by

demanding a bill of particulars. In the indictment of the case on trial there was no identification of the diamonds at all.

The diamonds were identified in the indictment by number and value. Further specifications could have been obtained upon application to the court for a bill of particulars, and such an application upon the first count of the indictment would have obtained the meaning of the statutory language of the indictment expressed in the facts which occurred. No reason can be perceived why the ruling of the Durland case does not properly apply to the case before the court.

In *Rosen* v. *United States* (161 U. S., 29) the indictment was for mailing obscene matter. The court held (p. 40) that the indictment should apprise the defendant of the crime charged with such reasonable certainty that he can make his defense, but that this right is not infringed by the omission of indecent matter not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and that in such case the accused may apply to the court before the trial is entered upon for a bill of particulars, and that this motion will be granted or refused as the court, in the exercise of a sound legal discretion, may find necessary.

Although in the case just cited there was no demurrer to the indictment, and no question raised as to its sufficiency until after the verdict, the court does not rely

specially upon those facts in applying the rule as to a bill of particulars, and the argument of the court in that case justifies, if it does not authorize, the remedy by bill of particulars in the case at bar.

In *Dunbar* v. *United States* (156 U. S., 185) the indictment was for smuggling opium, under sections 2865 and 3082, Revised Statutes, the property being described as "prepared opium subject to duty by law, to-wit, a duty of $12 per pound." It was held that this was a sufficient description of the property subjected to duty by paragraph 48 of section 1 of the tariff act of October 1, 1890, and that it is no valid objection to an indictment if the description of the property is broad enough to include more than one specific article, although to make available a judgment on such an indictment in bar of a subsequent prosecution, something besides the record might be required to identify the property; and the rule was stated to be that if the description brings the property clearly within the scope of the statute and identifies it so as to enable the defendant to prepare his defense, it is sufficient. The court suggest that if the description of the property does not so clearly identify it as to enable the defendant to prepare his defense, he should raise the question by some preliminary motion or perhaps by a demand for a bill of particulars; otherwise it may properly be assumed as against him that he is fully informed of the precise property in respect to which he is charged with a violation of the law.

Although in the case at bar the question was raised by demurrer, nevertheless the Dunbar case is authority for

the proposition that a bill of particulars, where there is doubt as to the allegations of the indictment, is the proper course by which a defendant may inform himself of the precise charges made against him.

The case in hand is one especially calling for the application of this rule. Crimes against the revenues, and especially the crime of smuggling, ought to be punishable with certainty and celerity, and, so far as rules of law permit, mere technical objections should not be favored. The crime is almost always so planned and carried out that it is very difficult to trace and detect, and if the Government is held to particularity of allegation of all the facts to the indictment, and accurate allegations of person, place, time, merchandise, and the statutory description of the character of the offense is held not to be sufficient, it would be difficult, if not almost impossible, to substantiate more specific averments by the proof; whereas, if the indictment is fairly sustainable under the language of the statute, all defect in detail is abundantly remedied without prejudice to the defendant by a bill of particulars. It is respectfully submitted that this was the proper remedy for the defendant in this case, and that the demurrer was rightly overruled in the court below.

The evidence sustains the conviction under this count.

The evidence clearly shows an importation contrary to law even under the limitation of that phrase herein contended for.

It was established by Captain Loesewitz's story, as corroborated to the satisfaction of the jury, that there

was a smuggling or clandestine introduction contrary to the provisions of section 2865, Revised Statutes, in reference to which it is sufficient to say that the facts clearly show a smuggling under the legislative definition given by the Antimoiety act of June 22, 1874 (18 Stat., p. 186), viz: "That for the purposes of this act smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the packages containing the same, through the custom-house or submitting them to the officers of the revenue for examination." Mr. Whitney's brief establishes the contention that this definition of smuggling, and not the common-law definition, is the proper one to be applied to the offense of smuggling under our revenue laws. There can be no doubt that the evidence at the very least shows acts, with intent to defraud, of attempting to bring dutiable articles into the United States without passing the same through the custom-house. Furthermore, section 3082 provides, "* * * Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

The testimony of Captain Loesewitz as to the transactions at Antwerp shows that the defendant had possession of the diamonds. (Record, pp. 24, 25.)

II.

As to the second count, the evidence and the charge of the court.

The learned counsel for plaintiff in error contends that the second count of the indictment is not governed by *Dunbar* v. *United States* (156 U. S., 185), because the charge there was for the smuggling of "prepared opium, subject to a duty of $12 per pound," and since no prepared opium was on the free list of the tariff act of October 1, 1890 (26 Stat., 567), the opium must necessarily be covered by paragraph 48 of section 1 of the said act; whereas in the case before the court merely the generic term "diamonds" was used, and, even granting that diamonds were not on the free list under paragraph 467 of the act of August 27, 1894 (28 Stat., 509), there are three rates of duty for dutiable diamonds by paragraph 338 of the last-mentioned act. But the court say in the Dunbar case, per Mr. Justice Brewer (p. 190):

> If "opium" as there used does not exclusively refer to crude opium, and if opium prepared for other uses than that of smoking is, when containing less than 9 per cent of morphia, subject to the duty of $12 a pound, "prepared opium subject to duty of $12 per pound" can mean only opium prepared for smoking, which, irrespective of the amount of morphia contained in it, is subject to that duty, or opium having less than 9 per cent of morphia and prepared for other uses, which is also subject to like duty. In either case the property charged to have been smuggled is property within the very terms of paragraph 48.

Furthermore, the court holds that that paragraph is not the statute describing the offense and imposing the penalties, and that in the indictment under the sections in question any words of description which make clear the articles in respect to which the offense is alleged are sufficient. Under this ruling the diamonds in this case are sufficiently pointed out by the second count. They are properly covered by paragraph 338 of the tariff act of August 28, 1894, and naturally fall within the first clause of that paragraph as "precious stones of all kinds, cut but not set, 25 per centum ad valorem." The other provisions of the paragraph do not properly include such diamonds.

The ground of the decision in the Dunbar case was not solely that the two classes of merchandise which might have been embraced within the statutory language were dutiable at the same rate, but also that the property was within the very terms of the paragraph in question. Here the property is embraced in the terms of paragraph 338 of the tariff act of 1894. Even conceding that the paragraph prescribes more than one rate of duty for dutiable diamonds, the lack of particularity was properly remediable by a bill of particulars.

We contend, therefore, that if there was any omission in the second count of the indictment, it was not of matter of substance, but of matter of form, which was cured by section 1025, Revised Statutes.

Definition of smuggling.

Counsel for plaintiff in error objects that the indictment should allege facts showing how there was smuggling. He contends that common-law definitions of smuggling should be applied to this case. (See authorities cited in revised brief, p. 49.) But the conditions under which those definitions were framed are long past and have no application to this case. The crime here is a statutory one, and the statutory definition of smuggling given in the Antimoiety act of June 22, 1874 (18 Stat., 186), as contended in the original brief for the Government, is properly applicable to this case. Furthermore, the definition of smuggling in *Dunbar* v. *United States*, given by Mr. Justice Brewer on page 193, namely, "the fraudulent taking into a country or out of it merchandise which is lawfully prohibited," is satisfied by the facts of this case.

In the case of *United States* v. *Claflin* (13 Blatchf., 178) Judge Benedict adopted the definition of smuggling contained in the Antimoiety act. So far as known there is no other ruling of the courts on this question.

The allegation in the second count that the goods should have been invoiced is sufficient. It was not necessary to state that they were not personal effects accompanying a passenger under the exception in the act of June 10, 1890, which provides in section 4 as follows:

> That except in case of personal effects accompanying the passenger, no importation of any merchandise * * * shall be admitted * * * without the production of a duly certified invoice, etc.

It is not necessary that the indictment should state matters of evidence merely, or anticipate or negative matter of defense, especially where such matter is contained in a separate or subsequent statute. Captain Loesewitz was in no proper sense a "passenger" within the meaning of that act.

Under the definition of smuggling given by section 4 of the Antimoiety act, an attempt to smuggle was properly alleged and the facts show an attempt to smuggle within the terms of that act. The act provides that "for the purposes of this act smuggling shall be construed to mean the act with intent to defraud of bringing into the United States, or with like intent, attempting to bring into the United States, dutiable articles without passing the same or the packages containing the same through the custom-house or submitting them to the officers of the revenue for examination." This is the definition of smuggling framed by Congress, and is properly applicable to all cases of smuggling, and includes in smuggling an attempt to smuggle in all cases since the act was adopted. As there was no common-law definition applicable to the offense of smuggling under the laws of the United States at the time this act was adopted, and as the act was on the books when the act of February 27, 1877, was passed amending section 2865 of the Revised Statutes, under which this indictment was framed, the definition given by the antimoiety act is clearly applicable to the offense of smuggling. The fact that the expression is used in that act that "*for the purposes of this act* smuggling shall be construed to

mean," etc., does not exclude its application to cases of smuggling generally, or for other purposes than those of the said act. Congress is presumed to have intended to apply that definition of smuggling, and not the common law definition applicable to earlier times and other conditions, when they passed the act of 1877 restoring in section 2865 of the Revised Statutes the provisions of the act of August 30, 1842 (5 Stat., 565), making it criminal to smuggle and clandestinely introduce goods, wares, and merchandise into the United States. What was smuggling for the informer was smuggling for the goods.

Counsel for plaintiff in error argues that, even if this legislative definition of smuggling and of an attempt to smuggle is adopted, the evidence fails to make out a case. He contends that at most there was an unexecuted intention to make an attempt to smuggle, or an attempt coupled with an intention to make an attempt to smuggle; that there is a clear distinction between an attempt and an intent; and that there were no overt acts toward landing the diamonds. It is sufficient to say that the attempt to smuggle, as distinguished from the intent, began with the transaction in the café at Antwerp, and was repeated in the various overt acts by which the diamonds reached the wharf at Philadelphia, and that to establish an attempt to smuggle under this act it is not necessary that an actual landing of the goods or proceeding to leave the vessel with the goods should exist. It should be remembered, also, that the captain offered to deliver the package to men whom he believed to be the representatives of

Keek, but who were customs inspectors. Was not this attempted delivery an overt act? Smuggling consists not so much in doing as leaving undone, and in every ordinary case the secrecy, when disclosure is a duty, is the overt act. No conviction could be had if an arrest were forbidden until after an opportunity to enter the goods had passed.

The court's rulings on the evidence were proper.

Captain Loesewitz gave a description of Keek to the revenue officer the day after the seizure of the diamonds. It was material, as testing completely the accuracy of the captain's story. It was not hearsay, but a fact in the cause. The captain stated (Rec., pp. 23, 24, 25) that he had met Keek in Antwerp and received the diamonds from him. Keek denied (Rec., pp. 98, 106) that he knew the captain or had ever seen him. If this were true, the captain could not give a description of him in all probability. No fact, therefore, was more important in corroborating the captain's story than the fact of his description of Keek. As will be seen by reference to the record, page 46, the court sustained an objection to anything the captain said to the revenue officer except when the diamonds were first found upon him; but the mere statement that the captain did give a description of Keek was not hearsay testimony, but a fact of importance, because Gallen acted upon it. The court sustained the objection as to what the captain said the next day, but admitted the testimony to the fact that a description was given. That testimony having been admitted, the dis-

trict attorney asked what the description was. The answer to this question would most probably have been excluded if the attorney for Mr. Keck had objected under the previous rulings of the court. No objection was however made, and therefore the plaintiff in error can not now take advantage of the subsequent admission of what the captain said. The chief objection to hearsay testimony is the inability to cross-examine the person whom the witness quotes. This reason does not exist in this case. The party quoted had already testified generally and to the specific fact of having given a description. (See folio page 66; printed, 27.) No objection was then made; the witness was fully cross-examined. The question asked of Gallen was therefore only cumulative. If the defendant had objected to the details of the description, why did he not move to strike it out?

As was said in the supplementary brief for the Government: "No real injustice would be done defendant by holding him to a rule of practice as strict as the rule of evidence to which he now seeks to appeal."

In the court's charge the language is that "it is sufficient to say that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged." This language merely describes the character and principal source of the testimony, and was equivalent to saying that if the facts in the case as charged are true, the defendant is guilty of the offense charged. So far as it tends to restrict the jury's attention to the captain's testimony as representing the Government case, it was not

prejudicial to the defendant, but was prejudicial to the Government in narrowing the case to one witness and then discrediting that witness. The captain's testimony, as corroborated, substantially established the case. The court fully cautioned the jury on the subject by pointing out the captain's interest, and adds:

> If, therefore, he stood alone, unsupported, you would naturally and properly hesitate to convict the defendant on his testimony, especially with the defendant's denial, which you have heard. The Government claims, however, that the captain is corroborated in important particulars and in such manner that it is not only safe to believe him, but that belief can not be avoided.

And later the court instructed the jury that from a careful consideration of all the testimony heard on both sides they must determine whether the defendant is guilty or not.

The answer of the court to the request No. 10 for the defendant (Rec., pp. 111, 112) instructs the jury satisfactorily on the subject of reasonable doubt. It is to be noted that the request called upon the court to charge that before the jury can find the defendant guilty the evidence must be consistent with *every* hypothesis of guilt and inconsistent with *any* hypothesis of innocence. This was a very broad request, and the court's charge properly modified it by holding the meaning of it to be that the jury shall be fully convinced from a careful examination of all the testimony that the defendant is guilty of the smuggling charged. The instructions were not modified to exclude in effect "the doctrine that all

the evidence must be consistent with a reasonable hypothesis of guilt and inconsistent with a reasonable hypothesis of innocence," as claimed by the learned counsel for plaintiff in error (revised brief, p. 150).

It is respectfully submitted that the judgment of the court below should be affirmed in this case.

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JANUARY 15, 1898.

No. 15.

Brf. of Atty. Gen. for U.S.

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

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BRIEF FOR THE UNITED STATES ON REARGUMENT.

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STATEMENT.

The court has directed the argument at this hearing to the question whether, assuming the diamonds to have been dutiable, the district court erred in any of its rulings in respect of what constitutes the crime of smuggling, and in the application of the law to the evidence. The verdict of the jury (Rec., p. 12) was that the defendant is guilty in manner and form as indicted. Although

it is understood from the court's order that the question is to be considered mainly with reference to the crime of smuggling as provided for in section 2865, Revised Statutes, the first count of the indictment, based upon section 3082, which is directed against importation contrary to law, is herewith quoted, as well as the second count, based upon section 2865 (Rec., pp. 1, 2):

> The grand inquest of the United States of America, inquiring in and for the eastern district of Pennsylvania, upon their respective oaths and affirmations, respectively, do present that heretofore, to wit, upon the eleventh day of February, in the year of our Lord one thousand eight hundred and ninety, one Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid and within the jurisdiction of this court, did knowingly, willfully, and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit, into the port of Philadelphia, certain goods, wares, and merchandise, to wit, five hundred and sixty-three diamonds of great value, to wit, of the value of ten thousand dollars, contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.
>
> 2. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations do further present that afterwards, to wit, upon the day and year aforesaid, the said Herman Keck, late of the district aforesaid, yeoman, at the district aforesaid, and within the jurisdiction of this court, did knowingly, wilfully, and unlawfully, and with

intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to wit, into the port of Philadelphia, certain goods, wares, and merchandise, to wit, five hundred and sixty-three diamonds, of great value, to wit, of the value of ten thousand dollars, without paying and accounting for the duty imposed upon the said goods, wares, and merchandise by the provisions of the act of Congress in such case made and provided, which said goods, wares, and merchandise so smuggled and clandestinely introduced as aforesaid were subject to duty by law and should have been then and there invoiced, the said Herman Keck then and there well knowing that the duty due and payable upon the said goods, wares, and merchandise had not been paid and accounted for, and that the said goods, wares, and merchandise had not been invoiced as required by the provisions of the act of Congress in such case made and provided, with intent in him, the said Herman Keck, to defraud the revenue of the United States, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

The fifth point for the defendant (Rec., pp. 110, 111 requested the court below to charge that—

> Although they [the jury] believe from the evidence there was an intention to smuggle or clandestinely introduce into the United States the diamonds mentioned in the indictment, and that Captain Loesewitz received said diamonds with the intention of not invoicing the same or putting the same on his manifest, and delivering same in America without paying duty thereon, and put the same in his stateroom on the steamer *Rhyland*, where they remained until said Captain Loesewitz was called upon to deliver same

> to Revenue-Officer Gallen, and that when delivered to Revenue-Officer Gallen said Captain Loesewitz knew said Gallen to be a revenue officer, then in that case there is merely an unexecuted intention to smuggle or clandestinely introduce, and would not constitute the crime of smuggling or clandestinely introducing or attempting to bring in, and as to the crime so charged your verdict must be not guilty.

The court refused to affirm this point.

Defendant's sixth point (Rec., p. 111) requested an instruction that—

> As the first count in each bill of indictment insufficiently states any crime against the laws of the United States, said first count in each bill of indictment is to be entirely ignored by them and not considered.

which was refused.

The eighth point (Rec., ib.) requested an instruction—

> That the second count in each bill of indictment charges that the defendant, Herman Keck, smuggled and clandestinely introduced into the United States the diamonds mentioned in the indictment, but does not charge him with aiding and abetting therein, and as the section of the statute upon which this count is based makes a distinction between the doing of an act and aiding and abetting therein, therefore your verdict must be not guilty upon the second count of both bills of indictment.

The court disaffirmed this point.

The tenth point (Rec., pp. 111, 112) was in these words:

> The jury are instructed that they will not be justified in finding a verdict of guilty, although there may be a preponderance of evidence of guilt. A

> preponderance of evidence of guilt will not be sufficient in warranting the jury in finding a verdict of guilty, but the jury must be convinced beyond reasonable doubt, from the evidence, that the defendant, Herman Keck, is guilty as charged. Before the jury can find the defendant guilty the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence.

The court's answer to this point (Rec., p. 112) was as follows:

> The court affirms the tenth point generally, but the meaning ascribed to it by the court is that the jury shall be fully convinced from a careful examination of all the testimony heard that the defendant is guilty of the smuggling charged, as testified to by Captain Loesewitz, and that if it is so convinced beyond room for reasonable doubt it will be justified in finding a verdict of guilty generally and should do so. If it is not thus convinced the defendant is entitled to an acquittal and should be acquitted.

By the answer of the court to the defendant's ninth point (Rec., p. 111), and in the charge (id., p. 112), the jury were instructed to scrutinize the testimony of Captain Loesewitz and to consider any interest or bias which he might have, and it is clear that the portions of the charge relative to the evidence of good character and upon reasonable doubt (Rec., p. 113) were correct and satisfactory.

The assignments of error specified error in certain rulings of the court as to admission or rejection of testimony (Rec., pp. 114, 115, 116), some of which, however, were not duly excepted to by the defendant, but these relate mainly to the credibility of one of the Government witnesses and to a certain hypothesis of the defendant's innocence, and do not touch the questions now before the court.

The remaining portions of the charge relative to the present issue are as follows:

> The several statutory provisions under which the defendant is indicted have been read to you and are doubtless understood. I need not undertake to explain them or to dwell upon the law governing the case. It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged. You have only to determine, therefore, whether it is true. * * * There are two indictments and a number of counts in each. If the defendant is found on the evidence to have committed the offense charged in any of the counts, he may be returned guilty in manner and form as he stands indicted.

The statutes involved in the case are:

> SEC. 2865, R. S. If any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares, or merchandise subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass or attempt to pass through the custom-house any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisonment for any term of time not exceeding two years, or both, at the discretion of the court.
>
> SEC. 3082. If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise contrary to

> law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury.

Substantially, then, the sole question before the court is, What constitutes the crime of smuggling? What acts and transactions, what omissions and situations, does the crime of "smuggling" comprehend as sufficient to constitute the offense; are the facts in this case such as to fall fairly within a proper definition of the crime of smuggling? In short, what is the crime of smuggling?

ARGUMENT.

I.

Before we discuss the subject under the language of section 2865, it is submitted that the crimes and offenses aimed at by section 3082 plainly include the acts established in this case. Smuggling is one of many forms of importation contrary to law, or, rather, is a comprehensive term including a whole series of criminal acts and omissions respecting importations; and all or nearly all these allied offenses have their appropriate prohibition

and penalty in the statutes, and therefore we contend that it would not do to say that because smuggling is provided against in section 2865 it can not be comprehended under section 3082. All forms of illegal importation are forbidden or provided against in the statutes, and upon this argument no form of illegal importation contrary to law would fall under section 3082 unless, perhaps, the importation of prohibited goods.

The case of *U. S.* v. *Thomas* (4 Ben., 370) intimates that section 3082 is to be applied only to prohibited goods, and *U. S.* v. *Claflin* (13 Blatchf., 178) may be held to support that view, but Justice Strong, in *U. S.* v. *Nine Trunks* (27 Fed. Cas., 161), disapproves of the restriction in the Thomas Case, and is of opinion that dutiable goods were in contemplation of Congress as much as goods which could not legally be imported at all. It is true that at the time of this decision section 2865 was not incorporated in the statutes in its present form, but the decision does not suggest that section 3082 would not apply, because the facts shown might embrace other offenses punished by existing laws.

The proper view would appear to be that all or most frauds upon the customs revenue are of the same inherent nature—that all are allied to smuggling and are different forms of importation contrary to law. As was said by the court in *United States* v. *67 Packages of Dry Goods* (17 How., 85, 93): "The latter [i. e., the passing or attempting to pass goods through the custom-house with intent to defraud the revenue by means of a false, forged, or fraudulent entry] is an offense which in effect and result is very much akin to that of smuggling, except

done under color of conformity to the law and regulations of the customs."

It may be well to point out here that while in *United States* v. *Stockwell* (13 Wall., 531, 551) the court held that the act of 1866 (sec. 3082) was strictly penal and not at all remedial, being avowedly enacted further to prevent smuggling, and that therefore it did not substitute new penalties for those imposed by former acts, but punished as a crime that which before had subjected its perpetrator to civil or quasi-civil liability. In another Claflin case (an action of debt for the penalty, 14 Blatch., 155), upon review in this court (97 U. S., 546, 552 553), the court held that although the act of 1866 was not remedial in the sense of authorizing a civil action, it not only had in view punishment of the offense described, but, by its denouncement of forfeiture, indemnity to the Government for loss sustained in consequence of the criminal offense. "The fine and imprisonment were superadded as a vindication of public justice." See also opinion of Judge Blatchford in *In re Leszynsky*, (16 Blatchf., 9, 14).

The conclusion, then, is that the facts proved herein constitute under the first count of the indictment a fraudulent importation contrary to law, within the meaning of section 3082.

II.

It will be proper to examine the question as it is presented under section 2865, somewhat in detail, in the light of definition, history, and legal decisions, with a consideration of various statutes affecting it.

1. DEFINITION.

The lexicons may be divided roughly into three classes—those which make the test of the crime *importation* contrary to law, or with intent to evade the payment of duties; those which regard the landing or bringing on shore of the goods as an essential element; and those which emphasize the secret and clandestine method appropriate to the offense. As the subject properly starts with the English common law definitions they may be given here:

> Smuggling consists in the bringing on shore, or carrying from the shore, goods and merchandise for which the duty has not been paid or of goods of which the importation or exportation is prohibited. (6 Bacon's Abridgment, 5th ed., p. 258.)
>
> Smuggling consists in bringing on shore, or in carrying from the shore, goods, wares, or merchandise for which the duty has not been paid or of goods of which the importation or exportation is prohibited. (1 Hawkins' Pleas of the Crown, 8th ed., p. 661.)
>
> Among the offenses against the revenue laws that of smuggling is one of the principal. It consists in bringing on shore, or carrying from the shore, goods, wares, or merchandise for which the duty has not been paid, or goods of which the importation or exportation is prohibited. (1 Russell on Crimes, 9th ed., p. 172.)

The industry of opposing counsel has now brought forward a fourth English authority, which is obscure and without great weight, that smuggling consists in clandestinely bringing on shore goods, etc.

Following this classification, Dr. Johnson defines the verb *to smuggle* as follows: "To import or export goods

without paying the customs;" and *smuggler* as "a wretch who, in defiance of justice and the laws, imports or exports goods either contraband or without paying the customs."

So, Webster: "To import or export secretly or contrary to law; or secretly to import or export without paying the duties imposed by law; to run, as to smuggle lace. To convey or introduce clandestinely." To the same effect are the Encyclopædic Dictionary, which also defines *smuggling* as "the act or practice of importing or exporting contraband or dutiable goods secretly and without paying the duties imposed by law; the act or practice of defrauding the revenue by importing or exporting goods clandestinely without payment of the duties imposed on them;" the Imperial Dictionary; the Century Dictionary, which further defines *smuggling* as the "offense of carrying or causing to be carried across the boundary of a nation or district goods which are dutiable, either without paying the duties or allowing the goods to be subjected to the revenue laws;" and to the same effect is Worcester. Encyclopædia Britannica: "Smuggling denotes a breach of the revenue laws either by the importation or the exportation of prohibited goods or by the evasion of customs duties on goods liable to duty."

The second class embraces, as stated, the definitions which are assimilated to the common-law statement, such as McCulloch's Commercial Dictionary (vol. 2, p. 515), which defines smuggling as the offense of defrauding the revenue by introduction of articles into consumption without paying the duties chargeable on them. It might, of course, be said that any authority which used the phrase

"without payment of the duties" instead of "by the evasion of duties," or some equivalent alternative form of words, is to be placed in this class, e. g., The Standard Dictionary, "to take merchandise into or out of a country against a legal prohibition, or without payment of the duties prescribed by law." But wherever the word "import" is used this view is negatived, and the phrase "without paying the duties," or similar phrases, must be held equivalent to "without allowing the goods to be subjected to the revenue laws."

In the third class the etymology of the word is emphasized as coming from Anglo-Saxon and allied originals, meaning to *creep* or to *slip into*. Thus, Stormonth: To bring goods into or convey goods out of a country secretly, in order to escape payment of the legal duties; to convey clandestinely; *smuggling*, the offense of passing goods into or out of a country without paying the legal duties. So the Penny Cyclopedia, vol. 22, p. 158: "Smuggling is the clandestine introduction of prohibited goods, or the illicit introduction of goods by the evasion of legal duties." The secret and clandestine element appears, indeed, in some form in nearly all the definitions, both as respects the technical offense and in the more general and derived sense of the term.

It will be said that these definitions are general, and are not to be taken as defining the *crime*. The nature of the question is such, and the range of transactions comprehended so broad, that herein it differs perhaps from murder, and some other crimes, in reference to which the essential elements are narrowed, so that, both in ordinary

and in technical use, the import is the same. But the general rule is that the ordinary use and meaning of a term controls its legal acceptation, and, consistently with the rule of strict construction in reference to crimes, the usual view and employment of the terms here will aid us in discovering whether the apparent restriction of the English common law definition is now effective.

Even the early law dictionaries, like Jacobs' and Tomlins', ignore the common law distinction, and as to the American law dictionaries, Bouvier's definition is: "*Smuggling:* The fraudulent taking into a country or out of it merchandise which is lawfully prohibited;" and Anderson's: "*Smuggle:* The act, with intent to defraud, of bringing or attempting to bring into the United States dutiable articles without passing them, or the packages containing them, through the custom-house or submitting them to the officers of the revenue for examination. Implies something illegal and is inconsistent with an innocent intent. Conveys the idea of a secret introduction of goods with intent to avoid payment of duties." Abbott's definition of smuggling is substantially the same.

The Supreme Court in the case of *United States* v. *Dunbar* (156 U. S., 185) clearly approves Bouvier's definition of smuggling.

Moreover, common-law authorities are not well established or unanimous. Sir J. F. Stephen, in the first volume of his History of the Criminal Law of England (p. 219), points out that common-law crimes and their definitions and distinctions were unsettled in England until the period between Coke and Blackstone, and then began to be established.

Hawkins, upon whose statement the common-law definition is founded, flourished in the latter part of the seventeenth and the early part of the eighteenth centuries.

H. J. Stephen, in his Summary of the Criminal Law (p. 89), defines smuggling as follows: "This offense consists in importing or exporting goods without paying the duties imposed thereon by the laws of the customs and excise, or of which the importation or exportation is prohibited," citing 1 Russ., 117.

Lord Hume, in his Commentaries on the Law of Scotland (Edinburgh, 1844, vol. 1, pp. 488 *et seq.*), defines "smuggling" as "importing goods from abroad without payment of the duties laid thereon by national authority toward the aid of the public service. This sort of trespass, which in all its shapes exposes the offender to pecuniary penalties and forfeiture of the goods, has in the more audacious modes of it been found necessary to be repressed with chastisements of a higher kind." He then proceeds to discuss the statutes from the time of George I, chiefly in reference to unlawful assemblies, and the assaulting and beating of officers and the running of goods. It seems that the more serious offenses were originally punished by death; then by transportation; and finally by imprisonment, with or without hard labor.

Bell's Dictionary of the Law of Scotland, page 225, defines contraband goods as those which are imported or exported without paying the duties imposed by law; and smuggling as the making, transferring, importing, or exporting of goods without paying the duties to Government and with the intention of defrauding the revenue (p. 768).

Irish treatises (Hayes's Crimes and Punishments; Archer's Digest; Brunker's Digest) seem to regard the various customs consolidation acts as merging and including all previous offenses relative to the customs revenue. No reference has been found in any of the Scotch or Irish authorities to the "common-law crime of smuggling."

We therefore contend that the common-law definition rests substantially upon the statement of a single treatise, is not supported by the authorities, and is not to be regarded as firmly fixed.

It thus appears from the foregoing that the later authorities on definition, both general and legal, take an enlarged view of the offense as compared with the earlier common-law authorities, and substantially hold, as we are contending, that in order to constitute the crime of smuggling it is only necessary that the goods should be brought within the jurisdiction, and that the crime includes the attempting to bring, as well as the bringing, of the goods without passing them through the custom-house or submitting them for examination. We shall endeavor to explain why this enlarged view is necessary and proper, and how it has been developed.

2. HISTORICAL.

It is not necessary to seek the beginnings of the crime, which is probably as old as any restrictions of municipal law on trade or by Government imposition of tolls, but confine ourselves to the comparatively modern period of the last two hundred years. The importation and exportation of base coin in England, as early as the fourteenth

century, was joined with the counterfeiting of "Lushboroughs" as an offense against the Crown prerogatives; and in the fifteenth century the evasion of import and export duties by smugglers, as later of excise duties, was an increasing complaint in the administration of justice. In the eighteenth century, as piracy declined, smuggling was made a substitute for it and engaged the criminal activities of those who formerly would have been rovers; and at the end of the eighteenth and the beginning of the nineteenth century smuggling was probably the most conspicuous crime in England. The coast dwellers were naturally smugglers, and looked upon the Government customs and excise officials as mortal enemies, and considered that they had as good right to be "fair traders" as any men to exercise their own vocation.

A long list of methods of evasion was met by equally numerous and intricate preventive regulations, but the statutes increased to little effect. The motive to the crime, of course, resides in tariffs; as they were reduced or abandoned the offenses declined, and the English experience under Walpole, Pelham, and Pitt taught the lesson that reduction of duties was more effective than preventive statutes, although the latter were not without effect, because the crime had begun to decline before duties were substantially reduced. But, generally, the change in respect of rate of duties from earlier times, when the rate per cent *ad valorem* ran into the hundreds, has largely caused the crime, as it was formerly practiced, to disappear. From the point of view of his theory of taxation, Adam Smith's famous defense of smuggling

arose, that while a smuggler is "no doubt highly blamable for violating the laws of his country, he is frequently incapable of violating those of natural justice, and would have been in every respect an excellent citizen had not the laws of his country made that a crime which nature never meant to be so." But every swindler might find equal justification, and say that his particular form of *malum prohibitum* is to be disregarded because it is not *malum per se*. Indeed, the line is often hard to draw, and this offense is in effect a breaking of the eighth commandment. The first requisite for civilized man is obedience to the laws, and the remedy is not to break but to change them. (See Pike's History of Crime in England, Dowell's History of Taxation, and the Encyclopædia Britannica.)

The reason why so little light upon our point, comparatively speaking, is to be found in the reports may be that in the former days of the lugger and the vigilant revenue force, if a smuggler were taken red-handed anywhere within the marine belt the forfeiture of vessel and goods and the condemnation and execution of the offender followed as matter of course, and few defendants considered it worth while to appeal.

What is the difference between the modern situation as to acts and methods of smuggling and the case in former days? Then it was impossible to guard effectually a long and sparsely settled coast line; means of communication and of transmission of intelligence were scanty and slow; smuggling operations were conducted consequently with boldness, although their clandestine and evasive

nature was inherent, and, as the actual landing of the goods at some remote place, under cover of night, or even openly by day and with the connivance and help of neighboring inhabitants and confederates, occurred in the vast majority of cases, the element of landing, being a pretty uniform fact in the crime, came to be fixed unconsciously, so to speak, in the old definition. This is believed to be true, because of the almost universal fact, notwithstanding the fact that as a rule no words become fixed and established in a law by accident and without purpose and meaning.

At the present day the case is essentially changed (although border and coast smuggling at unprotected points is by no means unknown), because the frontier and coast guard is much more effective, communication of intelligence and transportation is easy and rapid, the motives to the crime, by the reduction of duties, is largely restricted to articles of great value in small bulk, like those in the present case, and the methods prevalent have abandoned the old violent and semipiratical conditions and proceed through fraudulent invoice, undervaluation, false entry, and clandestine introduction by all manner of concealments and evasions on the largest steamers to the most populous ports. In other words, cunning and secrecy, which evade the authorities, and a sort of legerdemain by which officials are hoodwinked and smuggling is carried on, so to speak, under the very eyes of the law, have succeeded to the desperate acts and hardihood of former days.

The characteristic quality of the offense being its secret and clandestine nature, and the gravamen being

the intentional evasion of duties and consequent fraud upon the Government, can it be reasonably urged that the test is the actual physical presence of the goods on the shore and that a deliberate intention to land and evade the payment of duties, not remaining in intention merely, but so far carried out that a few steps across a gang plank would have finally consummated it—from which all presumption of innocence has fled, and in which no stool of repentance for the chief offender can find a place—is not sufficient to establish the crime? We use the inartificial phrase "finally consummated," because the crossing the gang plank with the diamonds would have been a final act or sequel and would have followed in due course; the *crime* had already been consummated.

The presumably unconscious agent was not thinking of a *locus penitentiæ*, nor could such an act of contrition be attributed to his principal, even if it had been in the former's intention; but it can not be doubted, from the testimony of Captain Loesewitz (Rec., p. 27), that he was prepared to deliver the diamonds to Keck's supposed messengers, and that as soon as he left the ship they would have been shipped to Cincinnati. Does the law, which here and in England has for a long time given officials authority to stop and search vessels and vehicles, and has subjected uncustomed goods found therein to seizure and forfeiture, say in effect to the Government: "You must make a choice in any given case; you can not both forfeit and prosecute as to the same goods; or, while you may proceed against the master on account of goods unmanifested, or against the owner of goods concealed, you can not in such case proceed against the

smuggler for the crime? In case you seize before unshipping, he has not committed a crime. You must wait and let him come ashore if you wish to pursue that course."

Must the Government run the risk of losing duties and of failing to prevent smuggling; must the right to search and seize before a landing be practically abandoned, or else the Government be lax in vindicating the sanctions of the criminal law? Must its duty to collect its revenues and its duty to punish crime be arrayed against each other? Are these offenses slight and the fraud hardly criminal, amounting only to a breach or evasion of an implied contract with Government? On the contrary, we earnestly urge that the provisions as to search and forfeiture not only gave increased means for seizing and forfeiting goods, but are entirely consistent with, and, indeed, imply, an intent to detect the crime of smuggling and punish it as such.

3. REVIEW OF STATUTES.

a. English.

There were stringent enactments against smuggling and fraudulent practices in customs in the time of Elizabeth, reciting that greedy and covetous persons convey merchandise out of creeks where no customer is resident, or through corruption of the customer, and by divers fraudulent practices import and export goods without payment or agreement for payment of the customs and subsidies due. (Dowell's Hist. Tax., vol. 1, pp. 165, 166.)

The act of 13 & 14 Car. II, c. 11, sections 4 and 7, authorizes search of ships and imposes a fine on officers of vessels who suffer packages aboard ship in port to be opened and the contents to be embezzled, and makes it an offense to take merchandise from shore to a vessel for export, or from a vessel for import without the presence of a customs officer. Various acts of the time of George IV, William IV, and Victoria (1 Geo. IV, c. 43; 6 Geo. IV, c. 108; 3 and 4 W. IV, c. 53; 4 and 5 W. IV, c. 13; 8 and 9 Vic., c. 87; 16 and 17 Vic., c. 107), impose penalties on persons found on board ship liable to forfeiture as being within a certain distance of shore with goods liable to forfeiture, and for assisting in unshipping such goods; forfeit boats made use of in removal of illicit goods or having double sides or bottoms; forfeit prohibited goods; authorize searches and seizures; forbid the importation of prohibited goods and the unshipping of goods liable to duties, customs not having first been paid; direct prohibitions and forfeitures against passengers concealing goods and persons concerned in unshipping prohibited or uncustomed goods; and apply more severe punishment to such acts as making signals to smuggling vessels at sea, assembling with firearms to assist in illegal importation or exportation, and resisting navy or revenue force.

The customs consolidation act of 1876 (39 and 40 Vic., c. 36), which consolidates and amends previous statutes, provides *inter alia* (sec. 177) that if any goods subject to any duty or restriction in respect to importation shall be found, either before or after landing, to have been concealed on board any ship, such goods shall

be forfeited. (Sec. 178) All goods, the importation of which is restricted, admissible to duty, and found or seized under the customs act, shall, for the purpose of proceeding for forfeiture or for any penalty incurred in respect of them, be deemed to be goods liable to be unshipped without payment of duties unless the contrary be proved.

Section 182 authorizes search of ships for prohibited or uncustomed goods within the limits of any port of the United Kingdom. By section 184 any person may be searched if the officers have good reason to suppose that such person is carrying uncustomed goods about his person. By section 186 every person who shall import or bring, or be concerned in bringing, into the United Kingdom any prohibited goods or any goods the importation of which is restricted, whether the same be unshipped or not; * * * with intent to defraud Her Majesty of any duties due thereon, or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties or of the laws and restrictions relating to importation * * * shall, for each offense, forfeit treble the value of the goods or £100. By section 237, when any conviction shall be had against any person for an offense against the customs act, and he shall have been adjudged to pay a penalty exceeding £100, he may be committed for the first offense to prison for not less than six nor more than nine months, and for a subsequent offense may be imprisoned in jail or the house of correction, with or without hard labor, for a period not less than six nor more than twelve months.

b. United States.

The United States statutes have followed in the main the English regulations not only as to invoice and entry and detection of frauds connected therewith, but in the delimitation of various offenses embraced in smuggling and the granting of authority to officials and the imposition of forfeiture of goods and penalties. The acts of July 31, 1789 (1 Stat., 29), August 4, 1790 (1 id., 145), and March 2, 1799 (id., 627), regulated and provided more effectually for the collection of duties on imports and imposed forfeiture for goods not duly invoiced, authorized search for goods arriving upon vessels upon suspicion of fraud, provided penalties for concealing goods, required prompt report of arrival of a vessel, the production of correct manifests, forfeited goods not on the manifest, established penalties for breaches of these and other requirements of the law as to unlading, invoice, entry, baggage of passengers, etc., and laid down forms and a course of procedure.

The act of March 2, 1821 (3 Stat., 616), regulated the entry of merchandise from any adjacent territory, requiring a manifest and forfeiting the goods and the vessel or vehicle if there were refusal or neglect to deliver a manifest. The act of March 3, 1823 (id., 781), amending the latter act, changed the penalty thereunder, and made it an offense to receive, conceal, or buy goods known to have been illegally imported, and to forcibly resist an officer of the customs in the execution of his duty. The tariff act of August 30, 1842 (5 Stat., 548), section 19 of which, as amended by the act of February 27, 1877

(19 Stat., 247), appears as section 2865, Revised Statutes, reenacted by section 26 (p. 586) all regulations, restrictions, and penalties of existing laws not inconsistent with the act.

The act of June 27, 1864 (13 Stat., 197), was entitled "An act to prevent smuggling, and for other purposes," and provided for unloading and inspection of goods and baggage imported from a contiguous foreign country, and for forfeiture of dutiable articles found on the vessel or vehicle which the owner or person in charge refused to submit to the customs officer. The act of February 28, 1865 (id., 441), reviving the provisions of the act of March 3, 1815 (3 Stat., 231), provided for stopping and searching vehicles and persons traveling on foot or on beasts of burden on which goods subject to duty, or which shall have been introduced into the United States in any manner contrary to law, are suspected; and also provided for search of buildings near the boundary line of the United States, for forfeiture of goods found and removal of the building, and for conviction and punishment of the persons receiving or depositing goods in such building, or aiding therein.

The act of July 18, 1866 (14 Stat., 178), of which section 4 has become section 3082, Revised Statutes, reenacts and renders more stringent the previous laws as to search and seizure of vessels, vehicles, goods, and baggage by officers of customs and other persons authorized, and contains the provision (section 2) that if it shall appear that any breach of law has been committed whereby vessel or goods are liable to forfeiture, it shall be lawful to arrest any person engaged in such breach, and again

imposes penalties for forcible resistance and for other offenses; the remaining portions of the act relate mainly to procedure as to claims upon property seized, to remission of fines and forfeitures, to regulations concerning vessels, and to penalties for bribery.

There are other allied acts, not, however, necessary to notice particularly, except the Anti-Moiety act of 1874, which will be considered hereafter, but it may be remarked finally as to this statutory review that the administration of customs law and procedure, as distinguished from the laying of duties and detection and punishment of offenses (which subjects were indiscriminately embraced in the earlier acts to regulate the collection of duties), was ultimately separated in the Customs Administrative act of June 10, 1890, as amended by section 32 of the act of July 24, 1897 (30 Stat., 214), although penalties and punishments appropriate to this branch of the revenue laws are imposed under this act (see secs. 9, 17, 26, 27). Most of the offenses now embraced in the subject are to be found in Title XXIV, Revised Statutes, especially in chapters 4, 5, and 7, regarding entry, unloading, and enforcement of laws and punishment for violations, and in the Customs Administrative act.

It appears that little light upon the present question is to be obtained from the civil law, and it is to be remembered that the theory and inspiration of Anglo-Saxon and civil law, respectively, are often divergent and repugnant.

It is evident, from provisions running through English and American statutes, that the true theory of the

crime is that it includes many separate and different offenses; that it is a continuing series of acts, or consists of successive steps; that it may be arrested at any stage and punished, not as if still resting in mere intention, but because its nature is such that scrutiny and detection must be directed over a long range, and if the series of steps must be fully completed before the combined and aggravated offense is consummated, before the crime is complete, the arm of justice is really paralyzed. Mere omission, quiescence, the failure to take certain prescribed steps are often the form the crime takes, which accentuates the necessity of scrutiny and punitive measures over a constantly changing condition of affairs; and so the laws generally have penalized the beginnings of smuggling, or the being in a position to smuggle, and punish acts, omissions, concealment, and secrecy, as the failure to obtain a consular certificate, the being found within a certain distance of the coast with goods subject to duties or restrictions and intended to be "run," not declaring dutiable goods in baggage, concealing, and the like.

These things all go to show that it has always been considered that the illegal acts in smuggling operations may be commenced before an unshipment. Moreover, most of the provisions look to the detection of attempts before a successful completion, and accordingly provide machinery therefor, rights of search, presence of customs officials when unloading into a lighter, or at landing of baggage. Most of the statutes seem to contemplate the detection of smugglers in the act, and their punishment accordingly, though, of course, there are always pro-

visions covering the completed result and the harboring of smuggled goods.

In the case of boats proceeding from the middle line of boundary waters, or vehicles transported on ferryboats plying on such waters, or crossing on bridges connecting the United States with contiguous foreign countries and seized before they are actually landed in the United States, or have reached the shore, would the right of the United States end with forfeiture? Would not the owners or persons in charge of the goods be criminals, within section 2865, caught in the act? These instances are not so strong as that of a vessel arriving from abroad and actually tied up to the dock; that is, arrived at the shore of the United States.

4. DECISIONS.

(A) *English.*—We are aware of the distinction between proceedings for seizure and forfeiture of goods and for fines and penalties on the one hand, and prosecution for crimes on the other. The rule of strict construction is, of course, applicable to both, for forfeiture proceedings are criminal in their nature rather than remedial, yet it may be held to apply more strictly in reference to crimes. However, the consideration of some cases involving the question of forfeiture among others will throw light upon the subject before us.

The case of *Wilson* v. *Saunders* (1 B. & P., 267) was an action of trespass for seizing goods which had been purchased at a revenue sale and withdrawn from the warehouse for export, and ruled the point, under a statute which forbade the importation of certain products of

India, that, if the goods had been withdrawn from warehouse, not with the *bona fide* intention to export, but with the intention to return, then that original withdrawal was illegal and rendered the goods liable, and the court says (p. 268): "The circumstance of actual relanding need not be shown, for the case would be vitiated by the original intention with which the goods were taken out of the warehouse."

In the case of *Attorney-General* v. *Towns* (6 Price, 198), defendant was charged with having incurred a penalty under 17 Geo. III, c. 39, sec. 25, for unshipping foreign glass without payment of duty, and for unshipping British glass after having been shipped for exportation, the entering and shipping being for the purpose of obtaining the drawback. The defendant, the master of a homeward-bound vessel coming up the Thames, sent a boat and men, with one of his own crew, to carry off certain boxes of foreign and British glass which were lying on the sands on the Essex coast, for the purpose of landing them at Woolwich. The goods were brought as far as Gravesend, where a customs officer boarded the boat and seized the boxes. Counsel for defendant contended that it was indispensably necessary to prove that the glass had been shipped for exportation and the drawback allowed, and that it had afterwards been laid on land. The court held that the seizure was lawful, and that the "very suspicious circumstances of the transaction warranted the verdict."

The case of *Attorney-General* v. *Tomsett* (2 Crompt., M. & R., 170) decided that an unshipment into a hoy or lighter within the limits of a port was sufficient to

constitute the offense of unshipping before payment of duties. It was not necessary that it be within a county or within the common-law jurisdiction of a country.

The same question was so decided in *Attorney-General* v. *Robson* (5 Exch., 790) and *Attorney-General* v. *Catt* (3 M. & W., 7).

(B) *American.*—In *United States* v. *Gates* (25 Fed. Cas., 1263) there was a conviction under section 2865, but there the goods appear to have been brought to land. In *United States* v. *Martin* (1 Hask., 166, 26 Fed. Cas., 1179) one who aided in smuggling was convicted, but there, too, the goods apparently were landed. The case of *United States* v. *The Express* (25 Fed. Cas., 1035) ruled the point that a discharge of cargo into lighters was not an unloading, but left the goods still within the vessel's control; but there was a permit in this case. The proceeding in *United States* v. *Mills* (26 Fed. Cas., 1260) related to the sentence and fine of a person convicted of smuggling—i. e., with fraudulently receiving, concealing, and facilitating the transportation of smuggled goods—under section 3082. The defendant was convicted under eleven counts relating to importations into Boston, the last cargo being seized at Loring's Wharf, and forfeited. It is not clear from the report whether the goods were actually on the wharf or still part of the cargo on board ship.

In *United States* v. *Nolton* (5 Blatchf., 427), Judge Nelson, in the northern district of New York, was of opinion that the nineteenth section of the act of 1842 does not apply to goods imported from adjacent territory,

which are governed by an earlier act, but that section 4 of the act of 1866 would cover such a case. In *United States* v. *Smith* (2 Blatchf., 127, 130), Judge Nelson uses the following language:

> The offense, in the act of 1842, consists in knowingly and willfully, and with an intent to defraud the revenue, smuggling or clandestinely introducing into the United States merchandise subject to duty, and which should have been invoiced, without paying or accounting for the duty; or, the making or passing, or attempting to pass, at the custom-house, a false, forged, or fraudulent invoice. The act must be smuggling or clandestinely bringing into the United States merchandise subject to duty; and it must be done with a willful intent to defraud the revenue. These are essential elements to constitute the offense, and must be established on the trial to warrant a conviction.

And in considering whether section 1 of the act of March, 1821 (3 Stat., 616), which imposed a penalty for bringing unmanifested goods into the United States from adjacent territory, was repealed by section 19 of the act of 1842, he further says:

> Here both statutes may well stand together, as the acts constituting the offense in the former are not covered by the latter. The former prescribes particular regulations to be observed on the frontiers by the importers of foreign merchandise, with a view to guard the revenue, annexing a penalty in case of a nonobservance. The violation of these comes far short of making out the offense under the latter. Both are directed against the importation of foreign merchandise without payment of the duty, but under a different state of facts and circumstances,

> and prescribing a punishment according to the aggravation of each case respectively. Hence, where the act is done knowingly and willfully, and with an intent to defraud, fine and imprisonment are annexed. * * * The same act committed under different circumstances may be the subject of different degrees of punishment, as an assault and an assault with intent to kill; but it by no means follows that the party is punishable by the infliction of each penalty.

As forfeiture, however, affects property and not the person, there is no reason why both penalties should not be inflicted in this case.

In the forfeiture case of *United States* v. *Two Trunks*, etc. (6 Ben., 218), in which the trunks containing dutiable merchandise only, not invoiced nor entered on the manifest, were found in a locked stateroom of a steamship arriving from abroad after all the passengers and their baggage had been landed, the court said (p. 220):

> The sixty-eighth section of the act [March 2, 1799] necessarily implies that goods subject to duty, found concealed on board of a vessel, may be in a condition to be subject to forfeiture if the duties on them have not been paid or secured to be paid, even though they are seized while still on board of the vessel. Ordinarily, the duties on goods are not necessarily expected to be paid or secured to be paid while the goods remain on board of the vessel. But, where they are found concealed on board of the vessel, and the duties on them have not been paid or secured to be paid, the presumption arises under the statute that an intention exists to defraud the Government out of the duties. The seizing and securing of the goods for trial is authorized if, when searched for,

> they are found concealed. All that the Government is bound to show to make out a *prima facie* case for forfeiture is to show that the goods were subject to duty, were searched for, were found concealed, and were seized by a proper officer.

The question suggested by this and similar cases, as to the connection between the penal consequence of forfeiture and the criminal situation presented at the point of seizure in intent, attempt, and a substantially completed result, is, does not the argument which holds this form of smuggling offenses to present a *prima facie* case requiring the less grave but penal result (even if also remedial) necessarily draw after it the view that the crime underlying all such offenses has been established *prima facie*, and must be rebutted by proof of innocent intent and of no attempt to violate the laws? May the criminal say: "You have not proved intent, nor any overt act of attempt; but even if you have, my carefully contrived machinery was not in motion when you seized, the goods were not landed, and your remedies on the whole situation ended with forfeiture." The general acceptation of the meaning of the word "smuggling," in its primary sense of a wide range of offenses against the revenue laws, should reasonably affect the technical conception of the crime, which is comprehensive, although some or all of the separate offenses and different steps entering into the process of violation are separately punished. There are certain hints and indications to this effect scattered through the law on the subject.

The title of various acts of a criminal character denouncing various forms of the offense and fixing punishment is, "An act to prevent smuggling," or "further to

prevent smuggling" (act of June 27, 1864; act of July 18, 1866). Certain provisions speak of goods being smuggled, or "in the act of being smuggled" (sec. 4, Anti-Moiety Act; Syn. Dec., 2265, 16617; par. 485, Rev. Cutter Serv. Reg.). Paragraph 9 of section 4596 of the Revised Statutes refers to any act of smuggling of which a seaman "is convicted." The English acts are directed against "persons concerned in importing prohibited or restricted goods, whether unshipped or not" (e. g., 16 and 17 Vict., c. 10, sec. 232); authority is given to officers to board any vessel and, if it shall appear that any violation of law has been committed, to arrest any person engaged in such violation (sec. 2, act of July 18, 1866); masters of light-house tenders are given police powers as to smuggling (act June 16, 1880, 21 Stat., 263); and by section 3 of the act of February 28, 1865 (13 Stat., 441), if there is reason to believe that dutiable goods have been deposited in a building *upon* or near the boundary line of the United States and any foreign country, without payment of duties and in violation of law, besides the right of search, seizure, forfeiture, and removal of the building, the person or persons who have so deposited goods or aided therein are subjected to fine and imprisonment.

We desire to avoid any begging of the question, but submit that such provisions at the threshold, so to speak, tend to show that punitive statutes and other legal provisions are regarding a general crime of smuggling, consisting of various forms and stages, subject to detection, arrest, and punishment at every step;

they do not support the view that if the acts, attempts, and omissions have been revealed and ended somewhere on the path between foreign territory and the custom-house, the course and extent of the transactions have stopped short of the crime of section 2865. By reason of the vigilance of the law, the crime has been detected as it was proceeding. The result intended and sought for by the criminal has been averted; the crime has not been successful, but it has been committed.

Although analogies are often unsatisfactory and sometimes dangerous guides, especially in reference to criminal laws, we submit certain determinations respecting the slave-trade law, in which lack of completion of the crime or of complete preparation for the crime at the other end of the line—that is, at the beginning—are considered.

In the *Emily and Caroline* (9 Wheat., 381), the court, addressing the question of forfeiture of a vessel under the slave-trade acts of March 22, 1794 (1 Stat., 347), and March 2, 1807 (2 Stat., 426), which forbade the fitting, equipping, and preparing vessels for the purpose of carrying on the slave trade, and subjected the vessel to forfeiture and imposed a fine of $20,000 upon the persons concerned in the illegal fitment, using the following language (p. 388):

> And to incur the forfeiture * * * it is said the vessel must be completely fitted and ready for sea; that no state of preparation short of this will satisfy the terms of the law or furnish any certain rule by which to determine when the offense has been committed and the penalty incurred. We can not, however, think that even applying to this law the

most rigid rules of construction applicable to penal statutes it will admit of the interpretation contended for on the part of the claimant.

In construing a statute, penal as well as others, we must look to the object in view and never adopt an interpretation that will defeat its own purpose if it will admit of any other reasonable construction. The object in view by the section of the law now under consideration was to prevent the preparation of vessels in our own ports which were intended for the slave trade. Hence is connected with this preparation, whether it consists in building, fitting, equipping, or loading, the purpose for which the act is done. The law looks at the intention and furnishes authority to take from the offender the means designed for the perpetration of the mischief. This is not punishing criminally the intention merely; it is the preparation of the vessel and the purpose for which she is to be employed that constitute the offense and draw after it the penalty of forfeiture. As soon, therefore, as the preparations have progressed so far as clearly and satisfactorily to show the purpose for which they are made, the right of seizure attaches. To apply the construction contended for on the part of the claimant, that the fitting or preparation must be complete and the vessel ready for sea before she can be seized, would be rendering the law in a great measure nugatory, and enable offenders to elude its provisions in the most easy manner. The intention * * * must be made out so as to leave no reasonable doubt. * * * We can discover no sound reason for delaying the seizure until the vessels were on the point of sailing. It could only be necessary to render more certain, from their complete fitment, the purpose for which they were to be employed, and if that be satisfactorily ascertained at an earlier stage

> of the preparation, the delay would be useless and evasion of the law rendered almost certain. * * *

The original fine under the slave-trade provisions was $2,000, and then was fixed at the highly penal sum of $20,000 and, by the act of April 20, 1818 (3 Stat., 450; see also secs. 5378, 5551, 5552, R. S.), to forfeiture and a lower fine was added imprisonment. The court, speaking by Justice Story, in the case of *United States* v. *Gooding* (12 Wheat., 460), in answering certain questions certified upon an indictment against the owner of a vessel under the act of 1818, affirm the views expressed in the case of the *Emily and Caroline*, and hold that any preparations for a slave voyage which clearly manifest or accompany the illegal intent, even though incomplete and imperfect, constitute a fitting out within the statute.

So that even after punishment was added to fine, and upon an indictment as well as upon information for forfeiture, it was adjudged that within the language and intention of the act an element of the crime did not need to be completely achieved. Furthermore, since forfeiture and fine are penal and result from a criminal offense—in this case from the crime or misdemeanor of smuggling or attempting to smuggle—it is not perceived why a graver degree of punishment should have the effect of withholding or relaxing the grasp of the law.

It will be said that in the slave-trade cases the preparation itself, whether complete or incomplete, was not merely a step in the offense, but was a distinct part of the crime, or constituted by itself a specific crime, upon which theory the determinations proceed. But if this be

so, we reply that "smuggling" is the crime in our case, not the landing of smuggled goods, and that it is to be urged with equal force that a complete result is no more necessary than a complete preparation in the other case.

The cases construing the neutrality acts present a similar situation, since in those cases also there is not only the penal remedy of forfeiture and fine, but the additional penal sanction of imprisonment of the person, and those cases as well determine that acts of preparation, either from the standpoint of forfeiture proceedings or of criminal prosecutions, need not be completely accomplished. (*United States* v. *Quincy*, 6 Pet., 445, 464; 2 Whart. Am. Crim. Law, 5th ed., sec. 2802, *note;* 2 McClean, 2.)

The mere mailing of a letter, the initial step in a transaction which is not fully completed in reality until the letter is received, fixes civil legal rights and liabilities, and in postal crimes constitutes the offense. (*In re Henry*, 123 U. S., 372; *United States* v. *Grimm*, 45 Fed. Rep., 558; *United States* v. *Duff*, 6 Fed. Rep., 45.)

The decision in *United States* v. *Gooding* (*supra*) considered also (at pp. 469, 473–475) the questions of agency in crime and form of indictment, to which the court is respectfully referred.

Adverting now briefly to the rules of construction of penal statutes and the cases thereon, we have before us an act which punishes one who smuggles or clandestinely introduces into the United States, with fraudulent intent, any merchandise subject to duty, which should have been invoiced, without accounting for the duty. Now, even

in criminal acts the rules of construction require that the language used shall be taken in its ordinary acceptation, unless a contrary intent is manifest. (*United States* v. *Wiltberger*, 5 Wheat., 76, 96; *Same* v. *Morris*, 14 Pet., 464, 475; *Same* v. *Winn*, 3 Sumn., 211; *Same* v. *Hartwell*, 6 Wall., 385, 396; *Same* v. *Lacher*, 134 U. S., 624, 628; *Wiborg* v. *United States*, 163 U. S., 632, 647.) The act does not specify the "crime of smuggling" or indicate in any way that the obsolete common-law distinction is to be imported. The language is, "If any person shall smuggle or clandestinely introduce." There are no common-law crimes against the United States; they are all statutory, and that fact surely requires that our statutory crimes should not necessarily be restricted to the common-law acceptation.

If this is not so then, whatever the language of an act of the nineteenth century may be in its ordinary modern meaning, we must turn the crimes denounced into their antiquated British patterns of two centuries ago, unless a contrary intent is clearly expressed by the terms used. That would be relying on the principle *stare decisis* with a vengeance; and not even that—for the modern English laws have parted company long ago from the common law definition, and it is impossible to find any decisions sustaining it—but it would be to stand on a single enunciation of one commentary copied almost identically into a more recent compendium and into a text book, without any other authority whatever.

It is submitted that this would be mere slavish adhesion to a voice out of the past, from which tendency modern jurisprudence has been during this century

keenly active to free itself. We have endeavored hereinbefore to show, therefore, that the old definition should not control, and that the ordinary legal meaning of the verb "to smuggle" should be accepted in defining what is meant by the crime and in comprehending all which may properly be included therein.

Besides, it seems quite clear that by the addition of the alternative phrase, "or clandestinely introduce," Congress was seeking to negative any vagueness in the word "smuggle" or any doubt based upon the common law requirement, and showed very plainly an intent to indicate a definition which should require no more than secret, illicit, and clandestine introduction within the jurisdictional limits of this country. These words emphasize the evasive nature of the offense and fairly anticipate and include the "attempting" of the anti-moiety act, an attempt so far successful and completed as to have brought the goods within the jurisdiction of the United States. No additional light is cast upon the subject by the debates over the tariff act of 1842, of which section 19 is the original of the statute before the court.

It is not necessary to cite lexicographers for the meaning of the words "clandestinely" and "introduce;" their meaning is clear and definite. "Introduce," used in this sense, is really broader than "import," and "clandestinely introduce" than "import contrary to law;" but they are, at least, as broad and entirely satisfy the requirement (if there is such a requirement in reference to "smuggling") of arrival of the goods within the limits of a port with intent to unlade. They are not a mere

paraphrase and equivalent of "smuggle;" they rather describe and define it, and if it were necessary to enlarge its acceptation and meaning, they do so enlarge, as we here contend. If the court adopt the views of the defense in this case, we respectfully submit that they will entirely ignore and set aside the meaning and effect of the words "clandestinely introduce."

Further, as to the rule of construction, in the case of *United States* v. *Hartwell* (6 Wall., 385), where the question was whether a clerk in the office of an assistant treasurer of the United States was fairly included within the terms of the subtreasury act of 1846, providing among other things against embezzlement by officers and other persons charged with the safe-keeping and disbursement of public moneys, the court say (p. 395 *et seq.*):

> We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. * * * The object in construing penal as well as other statutes is to ascertain the legislative intent. That constitutes the law. If the language be clear, it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction. * * * The proper course in all cases is to adopt that sense of the words which best harmonizes with the context and promotes in the fullest manner the policy and objects of the legislature.

The rule of strict construction is not violated by permitting the words of the statute to have their full meaning or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent. [Citing *United States* v. *Wiltberger*, 5 Wheat., 96; *Same* v. *Morris*, 14 Pet., 475; *Same* v. *Winn*, 3 Sumn., 211; 1 Bish. Crim. Law, sec. 123; Bacon's Abridg., title Stat. I.]

5. THE ANTI MOIETY ACT; SECTION 1035, REVISED STATUTES.

These laws raise the questions of the present definition of the crime of smuggling, and of the status of an attempt to smuggle, or to commit the crime of smuggling, under an indictment for smuggling based upon section 2865.

The Anti Moiety Act (18 Stats., part 3, p. 186) was passed upon June 22, 1874, upon the same day that the revision of the statutes was approved, but as the revision related to the acts determined to be in force as of December 1, 1873, the Anti Moiety act was not affected thereby. The act of February 27, 1877 (19 Stats., 240, 247), restored all of section 19 of the 1842 act to the statutes by amending section 2865. It was theretofore perhaps supposed that section 4 of the act of 1866 had supplied and repealed the first portion of section 19 of the act of 1842, on the theory that importation contrary to law included smuggling, even if some of the offenses were separately provided for, and the "smuggling clause" of the act of 1842 was, therefore, or by accident, omitted

from the revision of 1873–74. But the act of 1877 should be held to regard smuggling not as defined by the common law, but as shown by the language and purpose of the act of 1842 itself, even if the act of 1877 was not making any new law, but merely stating the law as it was; and since the definition of the Anti Moiety Act had intervened, that should be held to be in the mind of the legislature, and the act of 1877 not be held to relate back to the situation in 1842, or even beyond it and back to the common-law notion. Mr. Justice Miller in holding in *Bridge Proprietors* v. *Hoboken Co.* (1 Wall., 116, 148) that a word used in an earlier statute or contract need not necessarily include everything to which the word is applied at the present day, did not hold that the word may not include its modern extent.

The Anti Moiety Act provides in the first four sections for compensation to Government officers and informers in lieu of moieties, and the balance of the act relates mainly to procedure in suits other than criminal arising under the revenue laws, and to customs administration, and prohibitions, penalties, forfeitures, and remission of fines thereunder.

By the Customs Administration Act of 1890 certain sections of the Anti Moiety Act relating to administration have been repealed and their provisions supplied, but it may be conceded that the purposes of the Anti Moiety Act referred to in section 4 still exist in their relation to that section; that is to say, the purposes referred to are those subserved by the provisions regarding moieties, and they are still a part of the laws of the United States.

Section 4 of the act provides as follows:

> That whenever any officer of the customs or other person shall detect and seize goods, wares, or merchandise in the act of being smuggled or which have been smuggled, he shall be entitled to such compensation therefor as the Secretary of the Treasury shall award, not exceeding in amount one-half of the net proceeds, if any, resulting from such seizure, after deducting all duties, costs, and charges connected therewith, provided that for the purposes of this act smuggling shall be construed to mean the act with intent to defraud of bringing into the United States, or with like intent attempting to bring into the United States dutiable articles without passing the same or the package containing the same through the custom-house, or submitting them to the officers of the revenue for examination; and whenever any person not an officer of the United States shall furnish * * * original information concerning any fraud upon the customs revenue, perpetrated or contemplated, which shall lead to the recovery of any duties withheld, or of any fine, penalty, or forfeiture incurred * * * such compensation may, on such recovery, be paid to such person so furnishing information as shall be just and reasonable.

Now, since by section 2 of the act former provisions of the law under which moieties of fines, penalties or forfeitures had been paid to informers or officers of the United States were repealed, it is evident that the main purpose of these portions of the Anti-Moiety Act was to provide a new system of rewards in place of the former system, under which, as was said by Judge Brown in the case of the *United States* v. *Auffmordt* (19 F. R., 893, 898), the attention of Congress had been called to

the subject by abuses in the administration of the revenue laws, the machinery of the law being invoked by agents and informers of the Government for their own benefit to extort large sums of money from merchants for trifling or uncertain irregularities or violations of the law.

Consequently, Congress, in defining smuggling or the offense or crime of smuggling in section 4, were not extending the notion or conception of the crime, but were rather restricting it within narrower limits than had theretofore been fixed. They say, in effect, that while smuggling embraces a variety of acts, transactions, omissions, and attempts, including those which amount merely to trifling irregularities, the offense shall no longer be viewed so broadly as to permit the payment of moieties or rewards in any other cases than where there is the fraudulent act or fraudulent attempt to bring into the United States dutiable articles without passing them through the custom-house or submitting them to the revenue officers. Therefore, inasmuch as Congress did not enlarge the conception of the crime and then restrict it to the purposes of the act, but rather narrowed it for the ends of such restriction, it should be held to stand as a correct statutory definition, now embodied in the laws of the United States, and applicable to any indictment for the crime of smuggling.

While the intention of Congress, as shown by the debates, may not determine the meaning of the act, but the language used must be construed with reference to its meaning under the usual canons of interpretation, we may consider the debates as part of the general history

of the subject, or part of the legislative history, as the subject was presented to Congress. Opinions of this court have supported a certain view of a statute by reference to the debates in Congress. (*Elk* v. *Wilkins*, 112 U. S., 94, 112–114; *United States* v. *Wong Kim*, Ark., 169 U. S., 649, 682, 697.) Extrinsic facts are referred to in the construction of ambiguous statutes, and the purpose and motives of the legislation are sometimes examined, a survival perhaps from times when it was the custom of the judges to go to Parliament and inquire what they meant by the language of an act. (*Spencer* v. *State*, 5 Ind., 41, 48; *American Net and Twine Co.* v. *Worthington*, 141 U. S., 468, 473–4; *Tex. & Pac. Ry. Co.* v. *Interstate Comce. Commission*, 162 U. S., 197, 218; *United States* v. *Laws*, 163 U. S., 258, 262; *Church of the Holy Trinity* v. *United States*, 143 U. S., 457, 463, and cases cited; *United States* v. *Dauphin*, 20 Fed. Rep., 625, 626). And the doctrine of contemporaneous construction is invoked when we give great weight to the writings of Hamilton, Madison, Jefferson, and their contemporaries in resolving constitutional ambiguities. Now, it is evident from the debates that Congress were merely endeavoring to define smuggling so as to exclude from the definition all goods which pass through the custom-house or which custom-house officers might seize if they desired. See remarks of Mr. Beck (Cong. Rec., 43d Cong., 1st sess., p. 4038); and page 4809, Mr. Stewart feared that section 12 would repeal nearly all the general law defining crimes against the revenue by false and fraudulent invoice, and that the only way left in which a person who

fraudulently imports goods could be punished would be by forfeiture of the particular articles and suit in recovery of damages, and in the colloquy between Mr. Conkling and Mr. Sherman, on page 4815, it is evident that the definition was not meant to restrict smuggling to the act or attempt of bringing unenstomed goods into the United States, except in relation to compensation to the informer, but that all the other offenses, such as false and fraudulent invoice, were, in other respects, still to be considered as smuggling.

Mr. Conkling speaks "of the now prevailing definition," and on page 4724 Mr. Sherman says: "I think it is a little clearer definition than the existing law." It seems to be evident from the foregoing that the definition of the existing law to which they refer, although no formal statement can be found, was that definition or notion under which, as shown by the marginal summary scattered through the statutes and by the indices thereof, smuggling was regarded as the illicit or clandestine introduction of goods into the United States by importation without paying duty, and by false entry or fraudulent invoice as well; or else such definition was the definition indicated by the words "clandestinely introduce."

And on page 4720 Mr. Edmunds shows that Congress was restricting and not enlarging by his fear that unless the words "for the purposes of this act" are restrained to the section in which they occur and not applied to the whole act, there will be nothing left of smuggling except the act or attempt specified in section 4. He says "if I only bring them [the goods] to the custom-house, no matter how corrupt my intention may be, no matter

though I may have bribed that very custom-house officer in order to get them through; if I only lay them at his door or bring them into his presence * * * my duty is done, and the law by statute declares that I am not a smuggler, and there is no forfeiture for them."

In the *Claflin Case* (13 Blatch., 178), the court say (pp. 184–185):

> The word "smuggle" is a technical word, having a known and accepted meaning—"a necessary meaning in a bad sense." It implies something illegal, and is inconsistent with an innocent intent. The idea conveyed by it is that of a secret introduction of goods, with intent to avoid payment of duty. As such it is used by itself alone, and in the statutes, even. It is used in section 4596 of the Revised Statutes, in a provision relating to seamen, where an "act of smuggling" plainly is supposed to mean such an act as above described, and none other. The word is used in the same technical manner in the English statute (16 and 17 Victoria, chap. 107, sec. 244), where it is deemed sufficiently descriptive of a particular illegal employment in a ship to designate it as "a smuggling ship." This technical meaning of the word has taken the form of a statutory definition in the moiety act of June 22, 1874 (18 U. S. Stat. L., 186), where it is declared that the act of "smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles, without passing the same, or the package containing the same, through the custom-house or submitting them to the officers of the revenue for examination." What is smuggling for the informer when he claims his reward must also be smuggling for the goods as to which he informs.

In *United States* v. *Dunbar* (156 U. S., 185), determining questions arising upon an indictment for smuggling, under sections 2865 and 3082, the court, citing the Claflin Case as a smuggling case with approval, although in reference to the form of indictment, in considering the question of *scienter*, say (p. 193):

> Indeed the word "smuggling," as used, carries with it the implication of knowledge. In Bouvier (vol. 2, p. 528) smuggling is defined: "The fraudulent taking into a country or out of it merchandise which is lawfully prohibited." And such is the general understanding of its meaning. We have, therefore, both the use of a term which implies intentional misconduct and a specific averment that what was done was done willfully, knowingly, and with intent to defraud.

This decision, subsequent to the Anti-Moiety act and the Claflin decision, at least expresses no disapproval of the definition established by them (although the point now raised was not before the court); its language is broad enough to cover inferentially the definition of the Anti-Moiety act, and at all events it announces by the court an approval of the general understanding of smuggling as the fraudulent taking into a country merchandise which is lawfully prohibited or restricted.

In the *Thomas* case (4 Ben., 370), the language of the court is:

> Section 19 of the act of August 30, 1842 (5 Stat., 565), which provides for the punishment of any person who "shall knowingly, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce into the United States any goods,

wares, or merchandise subject to duty by law, and which should have been invoiced, without paying or accounting for the duty," makes the clandestine introduction or smuggling into the United States of dutiable goods, in cases therein provided for, a criminal offense which is complete as soon as the goods are so clandestinely introduced or smuggled into the United States; but in such cases it is the secret and clandestine manner of the importation, with the intent to defraud the revenue, and not the nonpayment of or not accounting for the duties prior to the importation which constitutes the gist of the offense.

Section 1035 of the Revised Statutes reads as follows:

> In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged: *Provided*, That such attempt be itself a separate offense.

As to the first clause of this section, the question is to be asked, Is it not an offense, reaching further than the remedy of forfeiture, to bring uncustomed goods within the limits of the United States with fraudulent purpose, and is not this offense necessarily included in that of smuggling and clandestine introduction with which the defendant is charged? We contend that when the evasive nature and preliminary secret acts and omissions of the crime as shown here are studied and the plain purpose of this statute kept in view, the conclusion will follow that the complete course of preparation and the acts and attempts consequent upon it are so merged

in the conception of the whole abstract offense that the former become an inseparable part of the latter, and are necessarily included therein. If this case does not fairly present the situation contemplated by the statute, it is difficult to conceive to what it may apply. It may be said that a felonious wounding on such language would be included in an indictment for assault with intent to kill, wounding having resulted from the assault; or that upon trial of the ringleader of a mutiny, an incitement to mutiny would be included; or unlawful cohabitation on an indictment for bigamy; and that such cases satisfy the statute without extending it beyond its natural and evident scope.

But not all other offenses like the foregoing would necessarily be included in their principals with such aptness as the offenses here in the crime denominated smuggling or clandestine introduction. Some of them would fall under the head of an attempt, and so would present the question under the second clause of the section rather than under the first, and, as will be argued below, the contention based upon certain crimes of violence begun or threatened, but not issuing in an overt act, does not properly apply to this case. Besides, it is difficult to imagine a case presenting more strongly and squarely the issue of criminal acts and offenses leading up to a final *delictum*, or included in it, and, in the sense of the law, constituting a part of it. But it might be urged that the proviso of section 1035 applies in effect to the whole section, and that it could not be permitted to convict the defendant of the offense alleged to have been included,

or of an attempt to commit the offense, unless the included crime as well as the attempt were a separate offense.

Arguing the question broadly, the general subject of inchoate crimes is presented, and the inquiry becomes, Is not an attempt to smuggle a separate offense properly reached by section 1035? The counsel for plaintiff in error argues elaborately that there was no overt act of the crime of smuggling in the case; that there was not even an overt act of attempt, and he seeks to draw back the chain of transactions to his innocent and passive client sitting in the Antwerp café, so that he appears to say that there was no overt act showing an intention to attempt to commit the crime of smuggling.

But we shall not attempt to follow his dialectics here. It is only necessary to point out to the court that the facts establish such acts and omissions, such a course of transaction, as bring his completed attempt to the very door of the custom-house; an attempt made up of many overt acts and the quiescent situation consequent upon them in the necessary character of his scheme, all resulting from his initial acts in Antwerp.

But counsel argue, even if there was such an attempt, that is not a separate offense, and seek to prove from cases respecting assault with intent to kill that mere interrupted intention or abandoned attempt will not justify conviction for attempt upon an indictment for a substantive crime.

The cases reviewed (brief of defendant in error, pp. 59–62) relate to such crimes of violence as assault with

intent to kill, which, like murder, presuppose a definite and sharply defined fact, and not a prolonged series of acts or course of dealing. Ordinarily, in such cases, there is not a scheme, slowly and by many steps matured, but a sudden action, and it has consequently, and no doubt justifiably, been held, under the peculiar circumstances in such cases, that if the definite act of crime does not result, a defendant who has not persevered to an overt attempt or has been diverted from it can not properly be convicted of the sharply defined and individuated principal crime.

If no murder or assault were committed, it might not be possible under the facts to establish an attempt to kill or commit an assault; but the case is very different with smuggling; no view properly regarding the nature of the crime could hold that the ultimate end sought, of secretly landing and having the goods on shore, is all there is in the offense, as the actual killing is the gist of murder. Therefore, in reference to this crime, the attempt should be viewed as a separate offense—that is, the term smuggling properly includes an attempt to smuggle, the landing of smuggled goods, and the still later stage of concealing or selling smuggled goods.

The language of section 1035 is that the attempt shall be "a separate offense;" it does not say "substantive crime." Under the language used it cannot be argued with force that the meaning necessarily is that the attempt must itself be a distinct misdemeanor at common law, or a separate statutory misdemeanor. If "separate offense" means substantive statutory crime, since the defendant argues that attempts are

not made substantive crimes under Federal laws, there is no domain in which section 1035 can operate, and it becomes nugatory, which is not to be allowed.

Referring again to the case of *United States* v. *67 Packages of Dry Goods* (17 How., 85, 93, 96), the court states that the acts of 1799 and 1823 sought to prevent fraud by false invoices, but did not afford the necessary protection, and that the provisions of the act of 1842 were enacted to cover the case subjecting the person to a misdemeanor for the smuggling of dutiable goods into this country and for passing or attempting to pass them upon false invoices, which is an offense akin to smuggling.

The court considers the "whole scope of the section," and in the dissenting opinion by Justice Campbell, although he is speaking especially of misrepresentation by the invoice, he says: "It is admitted that this act provides for cases never before comprehended in any revenue law. For the attempt to defraud is punished as well as the consummate effort. * * * There are, besides, provisions directed against smuggling." Now, since the purpose of these portions of the act of 1842 was as stated by the court, is it not fair to conclude that the words "smuggle or clandestinely introduce" in the same section were intended to follow the purpose shown by the whole scope of the section, and, there being no words to show a contrary intent, or any repugnant limitation of the word "smuggle" (but, rather, the opposite), that they include an attempt to "smuggle," or, as smuggling involves and includes the notion of "attempt," to introduce dutiable goods into the United States without accounting for the duty?

The pertinent provisions of the act of 1842 were preventive in their nature. They were in terms aimed at attempts to smuggle by false or fraudulent invoice, and they were in spirit aimed at attempts to smuggle in other familiar ways, such as the method before us, both of which classes of offenses previous laws had not sufficiently or satisfactorily prevented. The act says "smuggle or clandestinely introduce," but does not say "attempt to smuggle," because the words used include an attempt quite clearly and fairly by the language itself as well as by the spirit and purpose of the provision. Regarding the character of the crime and the preventive purpose of sections 17 and 19 of the act of 1842, we submit that the detection and prevention of attempts to smuggle were part of the purpose of the act, and that a frustrated attempt, such as here, is fully covered by its criminal provisions.

We therefore submit that the facts in this case do not show a mere inchoate crime, resting in intention only, but such an "attempt" as is properly embraced within section 1035 as a "separate offense."

6. THE EVIDENCE, AND THE TRIAL COURT'S APPLICATION OF THE LAW THERETO.

The Government's case was that the defendant was in Antwerp on January 27, 1896, which he himself admits (Rec., pp. 96, 97); that after introduction on that day to Captain Loesewitz at the house of the jeweler Von Hemmelrick, a mutual friend or acquaintance (pp. 23, 100), Keck proceeded with Loesewitz and Von Hemmelrick to the *Café Alsacienne*, on the *Place Vert*

in Antwerp. During the conversation there a small package was taken by Von Hemmelrick from his pocket and shown to the captain with the statement that it belonged to Keck and contained no valuables, which Keck confirmed, and with the request that the captain take it over to America. Upon the captain's question where he should send it, Keck himself wrote the address of T. Van Reeth, Cincinnati, upon part of a card (p. 25), and soon after the parties separated, Keck telling the captain to send the parcel by Adams Express. Keck did not state what was in the package nor explain who Van Reeth was, and the captain did not see him again before sailing.

The captain sailed on the *Rhyndam* January 29. He did not invoice or manifest the package. (Rec., pp. 23–26–27, 37, 40, 73.) On arrival of the steamer at Philadelphia February 11, after the passengers were all ashore, the captain received a call from Gallen and Cummings, the Treasury agents (pp. 27, 34, 43, 59). The accounts of the captain and the two Treasury agents of the interview are substantially the same. The captain's account is as follows (p. 27):

> When I reached the port of Philadelphia * * * two gentlemen entered my room and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, "Yes." I thought those gentlemen came for the package and that they were sent by Mr. Keck, and naturally, on my part, I asked them who they were. They said they were Treasury agents, and said: "Captain, that's a package of diamonds you have got to be sent to Cincinnati," and if I didn't deliver it I would be arrested. After a while I went

down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened.

Mr. Gallen states (pp. 43, 44):

> I spoke of the weather and other topics, and then I said: "Captain" (to whom I was unknown), "you have a package for the Coeterman Diamond Company—the Coeterman-Keek Diamond Company." * * * I repeated the name of the company. He said, "No, I have no such package." I said: "I beg leave to differ with you," and, indicating with my fingers, I said, "you have a small package which you received while in Antwerp." He said: "I have a package for Van Reeth, of 21 West Fourth street, Cincinnati, Ohio, and I will give it to you if you have an order for it."

See also page 52, where Gallen testifies that the captain said, "F. Van Reeth, 21 West Fourth street, Cincinnati." The captain testifies that he never saw F. Van Reeth and does not recollect ever having heard of him or hearing the name until Keek wrote it on the paper (pp. 39, 40, 107).

Upon a further request from the captain for an order, and reply from Gallen that he would like to see the package before delivering the order, the captain, after a few minutes' delay to finish his log, arose and said: "You remain here and I will go and get the package." Gallen followed him, unperceived, from the chart room, where they were, and saw him enter his own room and emerge with a package in his hand. Gallen then said: "Captain, that is the package I want." He said: "Where is your order?" Whereupon Gallen produced his card as United States Treasury agent. After some

demur they went back to the chart room, where the captain finally gave the package to Gallen, and after a search by Gallen of the captain's room and other parts of the vessel he went into the chart room again, broke the seal of the package, and opened it in the presence of the captain (p. 44). Gallen's testimony on these points is substantially confirmed by the testimony of Cummings (p. 59). The box had no address whatever upon it, and turned out to contain 563 diamonds, all cut, and dutiable at 25 per cent, which were subsequently appraised and libeled for forfeiture with due proclamation, no claimant for them appearing (pp. 44, 45, 59, 73, 74, 79). The captain testified that he had put the package in a drawer in his stateroom and the paper or card containing the address in his card case, intending when he arrived to wrap the package in another paper and then put the address on it for transmission (p. 34).

The circumstances of Keck's arrival at New York by the steamship *Aller* on February 14, and Gallen's conversations with him, are shown by the record on pages 46–70 inclusive, by the testimony of Gallen, Cummings, and various customs officials. Gallen testifies that he accosted Keck on board the *Aller* off Staten Island, and had some talk with him, establishing his identity, and shortly afterwards on the dock he held the package so that Keck could not see it and said: "Here's the package which belongs to your firm," to which Keck said: "There is no address on that package" (p. 48). Keck's reply and his inability to see whether there was an address on the box are shown also on the cross-examination of Gallen and by other witnesses (pp. 56, 64, 69).

At the hearing before the United States commissioner, at Philadelphia, on February 18 (p. 11), Captain Loesewitz positively identified Keck (without any prompting) from a number of people standing in the corridor of the Government building in Philadelphia, although he had not previously seen him since the interview at Antwerp (pp. 57, 58), and was not shaken in his identification subsequently (pp. 27, 28, 29, 107). At this hearing, also, the Captain produced the paper given him by Keck in Antwerp, containing Van Reeth's address (pp. 50, 51). He had not produced it at his own previous hearing, becaused he had waived hearing (p. 52). It seems that the writing on the paper was in some foreign language, either French or Dutch (p. 104), and that the conversation in the café with Von Hemmelrick had been in Flemish (p. 24), although Keck spoke in English (p. 40), but seems to have understood Flemish (p. 24).

The court below properly ruled out evidence as to prior smuggling by the captain unless connected with the defendant (p. 35), and (p. 46) declined to admit the declarations of the captain to Gallen the day after seizure of the diamonds, holding that what the captain said when the diamonds were first found may properly be admitted as part of the *res gestæ*, but that subsequent declarations were not evidence against the defendant. The court then admitted Gallen's evidence of the *fact* that the captain on the next day gave a description of the man who had given him the diamonds, overruling an objection of the defendant, and the character of the description, although not the words of the captain's declarations

thereon, was immediately thereafter received in evidence without objection from the defendant. The court sustained the Government's objection to a line of examination by the defense to show that since Keck's firm dealt wholly in rough diamonds and had no use for cut diamonds, he had no motive to smuggle, on the ground that the Government is bound to prove that the special diamonds were smuggled, and that the character of the business pursued by Keck's different firms had nothing to do with the question (pp. 93, 96).

Now, in the facts thus shown by the record we contend that there was very remarkable proof of the Government's case by circumstances which fully confirmed the information which it had received. Laying aside the statements by the captain, which, although not convincingly contradicted, are unsupported (as, for instance, his testimony that he had no previous knowledge of or acquaintance with Van Reeth), he (the captain) has the package or box with seals unbroken and without address; he volunteers that it is to go to F. Van Reeth, 21 West Fourth street, Cincinnati; he describes Keck so that he is easily identified by Gallen on the arrival of the *Aller*, and Keck, although several witnesses state that Gallen so held the box that any address on it could not have been seen, stated to Gallen on the dock at New York that the box had no address on it. Not only is the captain's story corroborated in important particulars by Gallen's evidence of what occurred on the *Rhyland* at Philadelphia, but the subsequent circumstances of identification from the captain's description of Keck, and of Keck's self-betrayal, made the corroboration certain.

Keck's scheme and the very paraphernalia of it, his own deeds and words, started forth to accuse him, and wove a circumstantial chain of proof which is irresistible in its strength, and against which, in the peculiar circumstances of the case, no flaw in fact can be found and no objection in law can be validly sustained. The only real complaint of the court below regarding admission or exclusion of evidence is found in the admission of Gallen's evidence as to the captain's description of Keck on the day following the seizure of the package, but we contend that this complaint is not well taken, because the court had just excluded the captain's subsequent declarations, and the fact that a description had been given and its substance (though not the captain's words) were elicited without objection. We contend that it was clearly competent for Gallen to testify to the mere *fact* that a description was given; this was not only one of the most important and striking elements in the case, but was necessary to be brought out in connection with the subsequent arrest of Keck to show how it was that Gallen knew and identified him immediately. The character of the description, even admitting that it gave the captain's subsequent declarations in effect, was not essential; it might have been excluded without weakening the Government's case and was admitted without serious prejudice to the defendant. The statement that a description had been given, although important, was brought in as a mere fact or incident. (See page 30 original Government brief; the supplemental brief at large, and pages 29 and 30 of the brief upon reargument at October term, 1897.)

It is further to be noted that Captain Loesewitz, although subjected to a very careful and lengthy cross-examination, was not shaken in any respect, and his testimony reveals no contradictions or discrepancies. His story is circumstantial, straight, clear, and positive.

This, then, being the case, what was the application of the law by the court below? The court no doubt was of opinion that such facts when proved constituted the crime of smuggling, as we have argued heretofore, but did not announce this conclusion of law and leave it to the jury to find merely the truth or falsity of the facts alleged. The court submitted the whole question to the jury upon the evidence and under the answers to the points, and in the charge gave proper instructions. The court, therefore, properly refused to affirm the first five points of the defendant, because there was ample evidence of more than an unexecuted intention to smuggle to take the case to the jury, and properly disaffirmed the eighth point, in which the defendant sought to obtain protection because the second count did not allege an aiding or abetting, (which is an alternative offense, applicable to the second portion of the section referring to the passing or attempting to pass a false invoice); and, besides, the evidence showed the defendant to be the principal and not an aider or abettor.

The tenth point submitted that preponderant evidence of guilt is not sufficient unless the jury is convinced beyond reasonable doubt, and that the evidence must be consistent with every hypothesis of guilt and inconsistent with any hypothesis of innocence. (See Government brief upon reargument, October term, 1897, pp. 31, 32.)

The court, in affirming this point generally, ascribed to it the meaning that the jury shall be fully convinced from a careful examination of all the testimony that the defendant is guilty of the smuggling charged as testified to by Captain Loesewitz, and both in this answer and in the charge required the jury to be convinced beyond reasonable doubt. And while the court, again in the charge, referred to Captain Loesewitz separately, "It is sufficient to say in this respect that if the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offense charged," this was said in connection with the introductory sentences of the charge referring to the statutory provisions and the jury's understanding of the law governing the case. Besides, it was not necessary for the court to explain the statutory provisions fully, because this appears already to have been done satisfactorily by the respective counsel.

The words mean no more than to say that such facts, if proved, would constitute smuggling. But this very paragraph shows that the court did not withdraw the legal question from the jury, but committed to them the entire determination of the defendant's guilt of the crime of smuggling as charged in the indictment, and with the language pointing out the captain's interest and bias both in the charge and by the affirmation of the ninth point, taken in connection with the language as to the contradiction of the captain by the defendant and young Van Reeth, and as to the evidence of good character, the following words of the court sufficiently cautioned the jury

and protected the defendant as to the necessity of corroboration of the captain:

> If, therefore, he [the captain] stood alone, unsupported, you would naturally and properly hesitate to convict the defendant on his testimony, especially with the defendant's denial, which you have heard. The Government claims, however, that the captain is corroborated in important particulars, and in such manner that it is not only safe to believe him, but that belief can not be avoided. The points of corroboration and the matters on which they depend have been referred to and dwelt upon by the district attorney very fully, and I need not further allude to them.

Finally, in view of the law respecting the validity of a verdict where one count of an indictment is good, the charge that "if the defendant is found on the evidence to have committed the offense charged in any of the counts, he may be returned guilty," is to be sustained.

We therefore submit that there was no reversible error in the court's application of the law to the evidence.

7. THE OPPOSING BRIEF.

We have noticed herein as the discussion has progressed the arguments advanced by the other side, and now consider some points which appear to be specially emphasized.

On pages 13 and 14 of the brief of defendant in error at this hearing it is argued that the word "smuggle" must be given its meaning at common law, but the authorities cited go no further than to hold that the common law furnishes a proper rule of interpretation (for instance, as to what "personal goods" means) where a

word or phrase used in it has a clear, definite, and precise meaning, and that a penal statute should not be held to embrace language not fairly within its letter and spirit, so as, for instance, to render words merely vulgar "obscene" or "lewd."

The decision of Justice Story in *United States* v. *Smith* (5 Wheat., 153) states that Congress when defining crimes may do so either by a reference to crimes having a technical name and determinate extent or by enumerating in detail the acts to be punished. But the known and determinate meaning, when the act of 1842 was passed, is the very question at issue at this point, and we have argued that there was no definite and settled meaning at common law by a long course of decisions or numerous authorities. And on pages 22–25 counsel contend for the application of the rule of strict construction and of collecting the intention of the legislature from the words they employ. But with the rule is to be remembered the qualifications which it bears, either expressly or by implication, as is sufficiently shown by the authorities invoked. There is, it is true, no room for construction where there is no ambiguity. But while we contend that the normal meaning of the word "smuggling" and the existing statutory definition, as well as the alternative phrase in the act, tend to remove or have removed the ambiguity so as to sustain the Government's contention, apart from these elements so much that is ambiguous exists in the subject as to the extent and comprehensiveness of the term that there is abundant room for construction with all the qualifications and conditions which are drawn after the rule.

Thus, as may be gathered from the language of the court in *United States* v. *Chase* (135 U. S., 255), while the rule of construing statutes with reference to the evil they were designed to suppress does not apply to instances which are not embraced in the language of the act, the rule, nevertheless, is of aid in ascertaining the meaning of language which is ambiguous and susceptible of conflicting constructions, and may apply to instances which are implied from a fair interpretation of the context of the statute. In our case, we contend that the purpose of the statute and the context of the smuggling clause, with the use of the words "clandestinely introduce," really do not require any implication, but present clear proof that the offense of smuggling does not necessitate the landing of smuggled goods.

Although counsel seem to concede that if the first count of the indictment were in form acceptable to their scrutiny a conviction might have been had thereunder upon the facts in the case, we think we should then have been met by the contention which they indeed make, that importation contrary to law does not mean that duty should be paid or accounted for before the goods are landed—and we would then be confronted by an additional element in the dilemma which is held to cast a barrier of protection around this case, and which may be stated about as follows: The captain did not manifest the goods, it is true, but the failure to do that is especially provided for in the law—that is not smuggling and Keck was not guilty of it.

The goods were not found concealed in Keck's baggage, nor, as a matter of fact, in the captain's baggage. The offense of concealing goods in baggage is separately punished. That does not constitute smuggling. At all events, Keck was not guilty of that offense. The count of the indictment seeking to make him so was held to be invalid, and although the goods were not concealed in the captain's baggage, they need not have been invoiced, because they are to be considered, notwithstanding, personal effects accompanying him as a passenger, and his failure to declare them as such need not be regarded by us, and *non constat* that he would not have at least reported them later; and as to the goods being imported contrary to law, it does not follow because they were imported that the duties would not have been paid in due time, when the captain reported them, as was his use, to the custom-house officials. If importation contrary to law refers to offenses other than smuggling in our sense and the introduction of prohibited goods, such as failure to manifest or failure to invoice and enter, or as invoice and entry upon fraudulent and false papers, those offenses are all separately provided for, and, besides, defendant has not committed them.

Such chameleon-like proceeding really underlies the defendant's contentions in this case, and utterly fails to take into account the fact that one may commit a misdemeanor or a series of misdemeanors through an agent or accomplice, and when standing aloof from the jurisdiction in which it actually occurs, or where it finally reaches its climax; and entirely ignores the action, the secrecy and

nonaction essentially a part of this crime, and the various steps and attempts by which the machination was launched and carried on in the course to its desired result. All the acts were done, in effect, by Keck, and together they constitute the offense of smuggling by him, no matter how many separate offenses they may include, for which others than himself are also responsible.

It is true that words may not be superadded to existing laws by the court where the addition would defeat the intention of Congress, as manifested by the language it selected to indicate its purpose; but this view of the court in the case of the *Bate Refrigerating Co.* v. *Sulzberger* (157 U. S., 1), as well as the statement that the language in the act then in question is so plain and unambiguous that refusal to recognize its natural and obvious meaning would be to change the law by judicial action, does not affect the principles upon which we are seeking to construe the term "smuggling" in the case before the court. We are adding no words to the law, and the term, if the Government's contention as to its clear meaning and extent is not to be accepted without close scrutiny, is sufficiently ambiguous to require examination and construction.

The entire argument that there was no act of smuggling or act of attempting to smuggle—that it is repugnant to charge a person with having done an act and at the same time with an attempt to do it—brushes aside the facts here, fails to reckon with the nature of smuggling as embracing acts and attempts and a secret scheme or method, and is finally lost in the mazes of overt acts of intention and preparation to attempt to commit the act

of smuggling. Having, on page 57 of the brief, reached a "tenth step in the preparation," counsel contend that the various stages of crime were merely preparation and that not one of them nor all of them put together constitute an act of smuggling or attempt to smuggle, and that therefore the crime of smuggling is nonexistent in the case. Although counsel seek to show the contrary, it should be remembered that the captain offered to deliver the package to men whom he believed at first to be the representatives of Keck. Was not this contemplated and attempted delivery an overt act? To what extent are overt acts, or the ultimate overt act, necessary in this crime?

Smuggling often consists not so much in doing as in leaving undone, and in every ordinary case secrecy and nonaction, when disclosure is a duty, constitute the overt act. The argument on the other side smacks too much of refined subtlety and passes far beyond the reasonable strictness of criminal law requirements. We urge, therefore, that the scheme, with its various overt acts, not the mere preparation, was interrupted or stopped only in the sense that it failed to bring about the result sought, of landing the smuggled goods. In that sense the consequences of the principal crime were averted, but the crime was committed. The attempt, then, revealed by the interruption of the captain's programme was an interrupted overt act—an interrupted series of overt acts done after all acts of preparation of the scheme devised in the defendant's brain and carried out by his hands in pursuance of the initial intention had been completed.

With reference to such crimes as attempt to assault or to discharge firearms with intent to kill or maim, the authorities cited by counsel on pages 59–61 really sustain our position. In *People* v. *Murray* (14 Cal., 159), the court declared that preparation consists in devising or arranging means, and attempt is direct movement toward commission. And in the case of *Mulligan* v. *People* (5 Parker's Criminal Rep., 105), the court approves Bouvier's definition of an attempt as an endeavor to do an act carried beyond mere preparation, but falling short of execution of the ultimate design, and adds that it is not always easy to determine where the line is which separates a preparation from an attempt. Remarking that this is peculiarly difficult with reference to smuggling, we have to say that the vice of the opposing argument is that it postpones too much, so to speak, the whole chain of circumstances. It ignores the gap (where preparation properly resides) between the intention and the occurrences at and after the scene in the Antwerp café, and asserts that preparation began there. On the contrary, the "devising and arranging of means," the packing of the box, and the plan to involve the captain were the preparation, and the occurrences in the café were the beginning of the "direct movement toward commission" and constituted the attempt, or part of the attempt at least.

Barclay's Digest of the Law of Scotland (Edinburgh, 1865, p. 199) contains the following reference to attempt as an offense:

> Dole or evil intent is essential to crime, but is to be inferred or gathered from the whole circum-

stances. * * * An attempt (*conatus*) to commit a serious crime, clearly shown by acts, is itself a crime.

Chapter XXII, of Stephen's History of the Criminal Law of England (vol. 2, p. 221), considers the subject of incitements, attempts and conspiracies to commit crimes. The writer states that the facts to which the law has to be applied must always, from the nature of the case, be more or less as follows: The crime must first occur to the mind; it must then be considered and determined upon; preparations more or less extensive must, in most cases, be made for it, and it must be carried into execution. The execution may either be prevented or may be fully carried out, in which case it may either accomplish, or fail to accomplish, the full object which the criminal proposed to himself. * * * Many actions which under any circumstances would be regarded as crimes are in the nature of attempts to commit some further crime. For instance, every crime against the person must of necessity involve an assault. Forgery and coining are attempts to defraud, though they may not in fact produce the desired result; and the same remark applies to perjury.

After stating the rule obtaining in Coke's time that offenders who had clearly shown their intention to kill should be punished as for murder, though their object was not carried out, which rule, however, appears to have been considered too severe and to have fallen into disuse, he points out that the doctrine that an attempt is an offense as such has been established from an early day,

and that the discretion allowed courts in regard to punishment obviates the difficulty which the disuse of the old rule because of its severity presented; and he proceeds to say that the law as to what amounts to an attempt is of necessity vague; that it has been said in various forms that the act must be closely connected with the actual commission of the crime, but that no distinct line upon the subject can be drawn, some decisions having gone a long way toward treating preparation to commit a crime as an attempt, and one case having held that an attempt is not the less a crime because the offender voluntarily desists. He also shows that with some exceptions civil codes do not punish attempts to commit offenses which would be described in English law as misdemeanors; and that the French and German rules are that in order to constitute an attempt there must be a "commencement of execution;" and that when an offender voluntarily desists, continental law treats as mere acts of preparation many things which in England would be regarded as attempts; but that, on the other hand, it is only in very recent times that the voluntary desisting has been regarded in England, and the English courts have drawn the line between acts displaying a criminal intent and acts amounting to a commencement to execute the intention; and he is of the opinion that the distinction must, in the nature of things, be indefinite; and thinks that while it is not easy to say upon grounds of expediency whether it is or is not wise to lay down the rule that an attempt from which a man voluntarily desists is not a crime, it would be dangerous to lay down such a rule universally; and in conclusion, he refers to the crimes which it is impossible to attempt

to commit, as, for instance, high treason by imagining the king's death, because the crime consists in displaying by an overt act a treasonable intention. Similarly a man could hardly attempt to commit perjury, riot, or libel, or to offer bad money, or to commit an assault, for an attempt to strike is an actual assault.

On page 68 it is argued that smuggling is not importing contrary to law, but smuggling, whatever else it may involve or require, if anything, besides mere technical importation, is certainly one form of importation contrary to law. And if upon the theory that full force and effect is to be given to all the provisions of the law, and the language of one section restricted so as to give full effect to another section, it is held that section 3082, which is directed against importing contrary to law, does not cover smuggling, upon this argument most if not all cognate frauds on the revenue would be excluded from section 3082, because they are elsewhere provided for, and that statute would cover only prohibited goods as intimated in the *Thomas Case* (4 Ben., 370), although Justice Strong in the case of the *Nine Trunks* (27 Fed. Cas., 161) declined to concur in this view, and held distinctly that dutiable goods were in contemplation of Congress in the act of 1866, and that unless it covers the illegal importation of dutiable articles as well as the introduction into the country of goods the importation of which was prohibited, there exists no penalty for smuggling dutiable goods into this country.

It is true this decision was rendered during the time when the clause as to smuggling and clandestine introduction in section 19 of the act of 1842 was omitted from

the revision, but if this is urged as a reason for not extending section 3082 to smuggling, the question arises, since section 2865 now stands as it does and most or all forms of irregular and illegal importation, except the introduction of prohibited goods, are covered by distinct provisions of the statutes, Does the importing contrary to law of section 3082 refer only to prohibited goods? Considering the evasive nature and secret methods of these offenses, and, in view of these, the difficulty of meeting the defense that devices and transactions which have really passed into the region of preparation and attempt are still covered by the mantle of mere inchoate intention, shall the evident anxiety and endeavor of Congress, shown by all the provisions, to leave no loophole, be disregarded at the behest of highly technical objections? Can these provisions in no sense and to no degree overlap, so to speak?

Upon pages 73 and 74 counsel refer to the eight elements of the crime, all of which we contend exist in this case, and argue that the captain was a passenger and the diamonds personal effects accompanying him, and that therefore, under the exception of section 4 of the Customs Administrative act, an invoice was not required. The decision of Justice Nelson in *United States* v. *Nolton* (5 Blatchf., 427) merely held that under the then existing laws goods coming from an adjoining foreign country did not require to be invoiced, and hence that section 19 of the act of 1842 did not apply to that case. The only answer necessary to make to counsel's argument is that these diamonds were merchandise and not personal effects, and that "passenger" in the act means one who

goes on board ship to be transported to his destination, and when it is reached leaves the vessel, and does not mean and include the captain, who periodically comes and goes on the same vessel as master and navigator.

As to the *corpus delicti* (pp. 76, 77), there can be no doubt that the package was positively identified as the one which was handed to the captain at the Antwerp café. The circumstances that the package had no address (to which Gallen testified and as shown upon its production with its wrappings in court) and that the captain, however, testified (Rec., p. 34) that he put the paper containing the address afterwards with the package in another paper and wrote the address on himself, are of no moment. Whatever temporary confusion may have existed in the captain's mind at the point when he so answered, he testified repeatedly, before and after, upon cross-examination and in response to the court, that he had kept the box or package and the card with the address separately, the former in a drawer on board the *Rhyland*, the latter in his card-case, and he explained the answer referred to, in reply to a further question of the court, by stating: "I left off the address besides, and it was my minding to wrap that package in another paper when I arrived here and then put the address on it; I intended to do that."

III.

CONCLUSION.

We respectfully refer the court to the previous Government briefs as to the form of the counts, particularly to pages 10 and 11 of the brief at the hearing of the

October term, 1896, and pages 5 *et seq.* of brief upon reargument at October term, 1897; and, regarding the refusal of a *dedimus potestatem*, to Section IV (beginning at p. 23) of the original Government brief.

If there was any error in the sentence, it may be remedied under the authority of *Ballew* v. *United States* (160 U. S., 187), by remand to the district court with instructions to enter a valid judgment, as by a term of imprisonment for a year and a day, instead of a year simply.

We submit to the court that smugglers by such methods, running only the risk (which does not involve a personal penalty) of finding a complaisant and corrupt captain, who will dare the detection of unmanifested goods, and the still more doubtful risk of the penalties for goods concealed in baggage, may stand upon the decks of steamers at our wharves and defy the customs authorities on the dock and say: "Forfeit the goods if you like, but I shall not land them and you can not touch me." Because the various secret steps of the transaction, whether a conspiracy or not, are obnoxious to the law and separately drawn down penalties, fines, forfeiture, and sometimes imprisonment, shall the aggregate offense, the substantially completed series, constituting a combination of criminal conduct both by deed and omission, for which the sanction of section 2865 forms the ultimate coping to the wall of barrier, go without adequate punishment?

The following language of the dissenting opinion in a recent case in this court (*Crain* v. *United States*, 162 U. S., 625), wherein the special question was as to form of indictment and whether one count in an indictment,

referring to matter in a previous count which is not good, thereby loses the reference, is generally pertinent to this case (p. 646):

> At a certain period of English history, when an accused person had no right to be represented by counsel, and when the punishments for crimes were so severe as to shock the sense of justice of many judges who administered the criminal law, it was natural that technical objections which, perhaps, alone stood between the criminal and the enforcement of a most severe if not cruel penalty should be accorded great weight, and that forms and modes of procedure, having really no connection with the merits of a particular case, should be insisted upon as a sort of bulwark of defense against prosecutions which might otherwise be successful and which at the same time ought not to succeed. These times have passed and the reasons for the strict and slavish adherence to mere form have passed with them.

And Justice Story in the Gooding Case (12 Wheat., 460, 475) says:

> The rules [as to certainty in indictments] which regulate this branch of pleading were sometimes founded in considerations which no longer exist, either in our own or in English jurisprudence, but a rule being once established it still prevails, although, if the case were new it might not now be incorporated into the law. So, again, in certain classes of statutes, the rule of very strict certainty has sometimes been applied where the common law furnished a close and appropriate analogy. * * * But these instances are by no means considered as leading to the establishment of any general rule. On the contrary, the course has been to leave every class of cases to be

decided very much upon its own peculiar circumstances. * * * There is great good sense in the rule which has been laid down, that where the offense is made up of a number of minute acts which can not be enumerated upon the record without great prolixity and inconvenience and the danger of variance, they ought to be dispensed with.

Certainly these views may be applied with force to the demand for the antiquated and inapt common law definition of the many-sided crime of smuggling as well as to the work of the pleader.

Considering, then, all the elements of the case, the character of the crime, the natural meaning of the word "smuggling," the fair import, extent, and inclusion of the language of sections 2865 and 3082, the effect upon their interpretation of the evil to be remedied, the intent of the legislature, and of recent definitions promulgated before section 2865 was established in our statutes; and considering, also, the proved facts in this case and the terms in which the court submitted it to the jury, we respectfully submit that this court will properly vindicate justice without striking at innocence, will uphold the administration of the law, and punish a crime which is grave in its nature and peculiarly difficult to reach and detect, by affirming the judgment below.

HENRY M. HOYT,
Assistant Attorney-General.
JAMES M. BECK.

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No. 551.

Motion by D. C.

Office Supreme Court, U.
FILED
FEB 1 1897
JAMES H. McKENNEY,
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Filed Feb. 1, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 551.

MOTION TO REASSIGN.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 551.

MOTION TO REASSIGN.

This cause was argued in December last, and on January 18 was ordered to be reargued with leave to counsel to submit upon briefs. Counsel for defendant in error offered to submit the cause either upon the present briefs or upon new briefs, as the plaintiff in error might elect. Counsel for plaintiff in error declined the offer, desiring an oral reargument.

The Solicitor-General therefore respectfully moves the court to reassign the case to be reargued at an early day.

Notice of this motion has been served on counsel for plaintiff in error, and proof of service has been filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

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No. 551. U.S.
Motion Papers for D. C.
Filed Oct. 7, 1896.
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JAMES H. McKEN

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 551.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

HERMAN KECK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 551.

MOTION TO ADVANCE.

The plaintiff in error was indicted in the district court of the United States for the eastern district of Pennsylvania at the May sessions, 1896, for smuggling diamonds into the United States. He was tried, convicted, and sentenced to pay a fine of $200 and be confined in the penitentiary for the term of one year. He has sued out this writ of error, and pending the decision of this court thereon has been admitted to bail in the sum of $10,000, and is now at large.

The Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on such day during the present term as may be convenient to the court.

Notice of this motion has been served on the counsel for the plaintiff in error, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

KECK *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 15. Argued November 10, 1898. — Decided January 9, 1899.

An indictment based upon that portion of Rev. Stat. § 3082, which makes it an offence to "fraudulently or knowingly import or bring into the United States, or assist in doing so, any merchandise contrary to law," charging that the defendant, on a date named, "did knowingly, wilfully and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit, into the port of Philadelphia," diamonds of a stated value, "contrary to law, and the provisions of the act of Congress in such cases made and provided" is clearly insufficient, as the allegations are too general, and do not sufficiently inform the defendant of the nature of the accusation against him.

An indictment for a violation of Rev. Stat. § 2865, which charges that the defendant "did knowingly, wilfully and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to wit, into the port of Philadelphia," certain "diamonds" of a stated value, which should have been invoiced and duty thereon paid or accounted for, but which, to the knowledge of the defendant and with intent to defraud the revenue, were not invoiced

Statement of the Case.

nor the duty paid or accounted for, sufficiently describes the offence to make it clear what articles were charged to have been smuggled.

Under the tariff act of 1894, c. 349, diamonds were subject to duty.

Mere acts of concealment of merchandise, on entering the waters of the United States, do not, taken by themselves, constitute smuggling or clandestine introduction.

The offence described in Rev. Stat. § 2865, is not committed by an act done before the obligation to pay or account for the duties arises.

The word "smuggling" had a well understood import at common law; and, in the absence of a particularized definition of its significance in the statute creating it, resort may be had to the common law for the purpose of arriving at its meaning.

A review of the principal statutes enacted in this country regulating the collection of customs duties establishes that, so far as they embraced legislation designed to prevent the evasion of duties, they proceeded upon the theory of the English law on the same subject; that is, that they forbade all the acts which were deemed by the lawmaker means to the end of smuggling, or clandestinely introducing dutiable goods into the country in violation of law, and which were likewise considered as efficient to enable the offender to reap the benefits of his wrongful acts; and that therefore they forbade and prescribed penalties for everything which could precede smuggling or follow it, without specifically making a distinct and separate offence designated as smuggling, or clandestine introduction.

Whether we consider the testimony of the captain alone, or all the testimony contained in the record, it unquestionably establishes that there was no passage of the package of diamonds through the lines of the customs authorities, but, on the contrary, that the package was delivered to the customs officer on board the vessel itself, at a time when or before the obligation to make entry and pay the duties arose, and that the offence of smuggling was not committed within the meaning of the statute.

THIS case was first argued on the 18th of December, 1896. On the 18th of January, 1897, it was restored to the docket for reargument, with leave to submit to the full bench on printed briefs at any time prior to the first Monday of the next March. On the 15th of February, 1897, a motion to fix a day for reargument, made by *Solicitor General Conrad* on the 1st of that month, was granted, and the case was assigned for argument on the second Monday of the next term. On the 19th and 20th of January, 1898, the case was reargued. On the 7th of the following March it was announced that the judgment below was affirmed by a divided court. On the 21st

of the same month it was announced that a motion for rehearing, in order to allow the submission of the cause to a full bench, was granted, and that the cause was taken on submission. On the 25th of April, 1898, the cause was restored to the docket for reargument, and assigned for argument on the second Monday of the next term. On the 10th of November, 1898, it was reargued.

The case then made is stated in the opinion.

Mr. Francis B. James for plaintiff in error. *Mr. Rankin Dilworth Jones* was on his brief.

Mr. James M. Beck for defendants in error. *Mr. Assistant Attorney General Hoyt* was on his brief.

Mr. Justice White delivered the opinion of the court.

The plaintiff in error was prosecuted under an indictment consisting of three counts. The first was intended to charge a violation of section 3082 of the Revised Statutes, by the alleged unlawful importation into the port of Philadelphia of certain diamonds. The second averred a violation of section 2865 of the Revised Statutes, by the smuggling and clandestine introduction, on the like date, and into the same port, of the articles which were embraced in the first count. The third count need not be noticed, since as to it the trial judge, at the close of the evidence, instructed the jury to return a verdict of not guilty.

The sufficiency of the first and second counts was unsuccessfully challenged by the accused, both by motion to quash and by demurrer. The jury returned a general verdict of guilty; and, after the court had overruled motions for a new trial and in arrest of judgment, the accused was duly sentenced. Error was prosecuted, and the case is here for review.

The assignments of error are numerous, but we need only consider the questions as to the sufficiency of the first and second counts of the indictment and the propriety of the conviction under the second count.

Opinion of the Court.

Was the first count sufficient?

This count was based upon that portion of section 3082 of the Revised Statutes, which made it an offence to "fraudulently or knowingly import or bring into the United States, or assist in doing so, any merchandise, contrary to law."

It was charged in the count that Keck, on the date named, "did knowingly, wilfully and unlawfully import and bring into the United States, and did assist in importing and bringing into the United States, to wit, into the port of Philadelphia," diamonds of a stated value, "contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States."

As is apparent, the alleged offence averred in this count was charged substantially in the words of the statute. In the argument at bar counsel for the United States conceded the vagueness of the accusation thus made; and, tested by the principles laid down in *United States* v. *Carll*, 105 U. S. 611, 612; *United States* v. *Hess*, 124 U. S. 483; and *Evans* v. *United States*, 153 U. S. 584, 587, the count was clearly insufficient. The allegations of the count were obviously too general, and did not sufficiently inform the defendant of the nature of the accusation against him. The words "contrary to law," contained in the statute, clearly relate to legal provisions not found in section 3082 itself, but we look in vain in the count for any indication of what was relied on as violative of the statutory regulations concerning the importation of merchandise. The generic expression, "import and bring into the United States," did not convey the necessary information, because importing merchandise is not *per se* contrary to law, and could only become so when done in violation of specific statutory requirements. As said in the *Hess case*, at p. 486:

"The statute upon which the indictment is founded only describes the general nature of the offence prohibited, and the indictment, in repeating its language without averments disclosing the particulars of the alleged offence states no matters upon which issue could be formed for submission to a jury."

As to the sufficiency of the second count.

In this count it was charged in substance that Keck "did knowingly, wilfully and unlawfully, and with intent to defraud the revenue of the United States, smuggle and clandestinely introduce into the United States, to wit, into the port of Philadelphia," certain "diamonds" of a stated value, which should have been invoiced and duty thereon paid or accounted for, but which, to the knowledge of Keck and with intent to defraud the revenue, were not invoiced nor the duty paid or accounted for.

Two objections were urged against this count: first, that diamonds, under the law then in force, were on the free list, and hence not subject to duty; and, second, that if all diamonds were not on the free list, at least some kinds of diamonds were on such list, and the count should therefore have specifically enumerated the kinds or classes of diamonds which were subject to duty by law.

With respect to the first objection, counsel for plaintiff in error contends that all diamonds were free of duty, because of the following provision contained in the free list of the tariff act of August 27, 1894, c. 349, 28 Stat. 509, to wit:

"Par. 467. Diamonds; miners', glaziers' and engravers' diamonds not set, and diamond dust or bort, and jewels to be used in the manufacture of watches or clocks."

Paragraph 338 imposes duties as follows:

"Precious stones of all kinds, cut but not set, twenty-five per centum ad valorem; if set, and not specially provided for in this act, including pearls set, thirty per centum ad valorem; imitations of precious stones, not exceeding an inch in dimensions, not set, ten per centum ad valorem. And on uncut precious stones of all kinds, ten per centum ad valorem."

It is apparent that it was not the intention of Congress to put one of the most valuable of precious stones on the free list, while all others were made dutiable. The word "diamonds," which is but the commencement of paragraph 467, was plainly designed as a heading, for convenient reference, and the semicolon following should be read as though a colon.

The other ground of objection to the second count is con-

trolled by the decision in *Dunbar* v. *United States*, 156 U. S. 185. In that case, paragraph 48 of section 1 of the tariff act of 1890 provided that opium containing less than nine per cent of morphia, and opium prepared for smoking, should be subject to a duty of twelve cents per pound. Counts charging the smuggling of "prepared opium . . . subject to duty by law, to wit, the duty of twelve cents per pound," were held to sufficiently describe the smuggled goods. Here, as in the *Dunbar case*, the words of description made clear to the common understanding what articles were charged to have been smuggled; and, for that reason, we hold the objection just considered to be without merit.

Was the conviction under the second count of the indictment proper?

The principal witness for the government was one Frank Loesewitz, a resident of Antwerp, Belgium, and captain of the steamer Rhynland, of the International Navigation Company, which vessel plied between Philadelphia and Liverpool. He testified, in substance, that on January 21, 1896, late in the afternoon, while at the residence of one Franz von Hemmelrick, a jeweller in Antwerp, he for the first time met the accused; that in his company and that of Von Hemmelrick he went to a café in the neighborhood; that during the conversation which followed Von Hemmelrick took from his pocket a small package and handed it to the witness with the statement, made in the hearing of Keck, that it belonged "to that gentleman here" (Keck); that it did not contain any valuables, and Von Hemmelrick asked the witness to oblige him by taking it over to America. The captain further testified that Keck also said that the package did not contain any valuables. The witness asked Keck where he wished the package sent, whereupon he tore off a piece of card which was lying on the table, and wrote on it the address of a person in Cincinnati, whom it subsequently developed was associated in the diamond business with Keck. The card and the package in question were produced in court and identified by the witness. Subsequently, on leaving the place, Keck requested the witness to send the package to Cincinnati from

Philadelphia by Adams Express. There was no address upon the package, and the card handed by Keck to the witness was placed by him in his pocket book or card case. Soon after, the witness crossed to Liverpool and joined his vessel there. The package was by him placed in a drawer in his (the captain's) room, where it remained undisturbed until the arrival of the ship at her dock in Philadelphia. Just as the vessel was approaching her moorings, a special agent of the Treasury Department boarded her. This special agent thus describes in his testimony what then ensued:

"Acting on information received that, at the instance of Herman Keck, the captain of the Rhynland had endeavored to smuggle diamonds, I met the steamship Rhynland upon her arrival here on the eleventh day of last February, about four or five o'clock in the afternoon. I went aboard and examined the passenger list to see if Keck was on board, or any one under that name, and I also examined the manifest to find if there were any diamonds. I found no one particularly on the passenger list corresponding to the name of Herman Keck, and no diamonds appeared on the manifest.

"The weather was very rough that day, and the boarding officers boarded just as she was coming into the dock. I then asked one of the custom inspectors to examine closely the baggage of one or two of the cabin passengers, whom I suspected, to ascertain whether they had any large quantity of jewelry, after which I went into the chart room where the captain was with Special Agent Cummings."

What occurred in the chart room between the captain and the special agent of the Treasury Department is thus testified to by the captain:

"When I reached the port of Philadelphia, after the passengers were landed, two gentlemen entered my room, and they said they had information from Antwerp that I had a package to a friend to send it to Cincinnati. I said right away, 'Yes.' I thought those gentlemen came for the package, and that they were sent by Mr. Keck, and, naturally, on my part, I asked them who they were. They said they were Treasury agents, and said, 'Captain, that's a package of dia-

monds you have got, to be sent to Cincinnati,' and if I didn't deliver it I would be arrested. After awhile I went down in my room and brought the package up and delivered it over to the Treasury agents. That's all that happened."

The special agent thus states what passed in the chart room:

"I spoke of the weather and other topics, and then I said: 'Captain,' — to whom I was unknown — 'you have a package for the Coeterman Diamond Company, the Coeterman-Keck Diamond Company, 24 West Fourth street, Cincinnati, Ohio?' I repeated the name of the company. He said, 'No; I have no such package.' I said, 'I beg leave to differ with you;' and, indicating with my fingers, I said, 'You have a small package which you received while in Antwerp.' He said, 'I have a package for Van Reeth, of 21 West Fourth street, Cincinnati, Ohio, and I will give it to you if you have an order for it.'

"At that time, I understand you to say he did not know you were a Treasury agent?

"No, sir; I was unknown.

"Had you ever met him before?

"Never met him before to know him.

"I then said, 'Captain, I have an order for them.' He said, 'Show me the order, and I will go and get the package.' I replied, 'Captain, I would like to see the package first before delivering the order, and I want to speak to you in private.'

"Was there anything on your clothes like a badge or anything else to show what you were?

"No, sir; none whatever. He was doing some writing at the time — I think finishing the log — and he asked me to wait until he finished, and I said, 'Certainly.' After the lapse of about five minutes the captain arose and said, 'You remain here, and I can go and get the package.' As soon as the captain left the chart room I quietly and unperceived by him followed him, and saw him enter his room, and just as he emerged he had a package in his hand. As soon as I saw it I said, 'Captain, that is the package I want.' He said, 'Where is your order?' I produced my card as United States Treasury agent.

He refused to let me have it until I was identified as a custom house officer. A young man (being) present at the conversation opposite the captain's room, who represented the steamship company, we agreed to go back to the chart room, where I again insisted on getting this package, and this young man who represented the steamship company, who was present, advised the captain to give the package to me, which the captain did."

The package referred to was found to contain five hundred and sixty-three cut diamonds of the value of about seven thousand dollars, which were subject to a duty of twenty-five per cent. The diamonds were subsequently sold under forfeiture proceedings instituted by the government, and no claimant for them appeared.

Exception was taken on behalf of the accused to the following instruction given by the trial judge to the jury: "If the statements made here under oath by Captain Loesewitz respecting his receipt of the package of diamonds in Antwerp and bringing them here are true, the defendant is guilty of the offence charged." An exception was also noted to the refusal of the court to direct the jury to return a verdict of not guilty upon the second count, and the questions reserved by these two exceptions are pressed as clearly giving rise to reversible error.

The contention on behalf of the accused is that there was error in refusing to instruct a verdict and in the instruction given as to the captain's testimony, because even although all the acts of the captain of the Rhynland done in relation to the package of diamonds were believed by the jury to be imputable to Keck, they did not constitute the offence of smuggling within the intendment of the statute. At best, it is argued, the legal result of the testimony was to show only an unexecuted purpose to smuggle, a concealment of the diamonds on the ship, and a failure to put them on the manifest of the vessel, all of which, although admitted to be unlawful acts subjecting to a penalty and entailing forfeiture of the goods, were not, it is claimed, in themselves alone the equivalent of the crime of smuggling or clandestine introduction

which the indictment charged. This crime, it is insisted, is a specific offence arising from the evasion of custom duty by introducing goods into the United States without making entry thereof and without paying or securing payment of the duties, and thus passing them beyond the line of the customs authorities, where the obligation to pay the duty arose, and is not, consequently, established by proving antecedent acts of concealment preparatory to the commission of the overt act of smuggling when these antecedent acts were not followed by the introduction of the goods into the United States, but where, on the contrary, the goods, before or at the time when the obligation to pay the duty arose, were surrendered to the customs authorities.

The United States, on the contrary, maintains that the facts were sufficient to justify a conviction for smuggling or clandestine introduction, as those words embrace all unlawful acts of concealment or other illegal conduct tending to show a fixed intent to evade the customs duty by subsequently passing the goods through the jurisdiction of the customs officials without paying the duties imposed by law thereon. It is hence contended by the prosecution that the crime of smuggling or clandestine introduction was complete if the acts of concealment were in existence when the vessel entered the waters of the United States, even although at such time the period for making entry and paying or securing the duties had not arisen and even although subsequently and before or at the time when the obligation to make entry and pay duties arose the goods were delivered to the customs authorities.

The questions for determination, therefore, are: Did the testimony of the captain justify the court in giving the instruction that there was a legal duty to convict, if the jury believed such testimony? and, did the court, admitting the testimony of the special agent to be true, err in refusing to instruct a verdict as requested?

The charge of smuggling was based on section 2865, Revised Statutes, which is as follows:

"If any person shall knowingly and wilfully, with intent to defraud the revenue of the United States, smuggle, or

clandestinely introduce, into the United States, any goods, wares or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass, or attempt to pass, through the custom house, any false, forged or fraudulent invoice, every such person, his, her or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both at the discretion of the court."

This section in its complete state is but a reproduction of section 19 of the tariff act of August 30, 1842, c. 270, 5 Stat. 548, 565. That portion of the section which made it an offence to smuggle or clandestinely introduce articles into the United States was omitted in the revision of 1874, but the act of February 27, 1877, c. 69, 19 Stat. 240, 247, which recites that it was enacted "for the purpose of correcting errors and supplying omissions in the revision," reinstated the omitted clause by an amendment to section 2865.

Whatever may be the difficulty of deducing solely from the text of the statute a comprehensive definition of smuggling or clandestine introduction, two conclusions arise from the plain text of the law: First. That whilst it embraces the act of smuggling or clandestine introduction, it does not include mere attempts to commit the same. Nothing in the statute by the remotest possible implication can be found to cover mere attempts to commit the offence referred to. It was indeed argued at bar that as the concealment of goods at the time of entering the waters of the United States tended to render possible a subsequent smuggling, therefore such acts should be considered and treated as smuggling; but this contention overlooks the plain distinction between the attempt to commit an offence and its actual commission. If this premise were true, then every unlawful act which had a tendency to lead up to the subsequent commission of an offence would become the offence itself; that is to say, that one would be guilty of an offence without having done the overt act essential to create the offence, because something had been done which, if

carried into further execution, might have constituted the crime. Second. That the smuggling or clandestine introduction of goods referred to in the statute must be "without paying or accounting for the duty," is also beyond question.

From the first of the foregoing conclusions it follows that mere acts of concealment of merchandise on entering the waters of the United States, however preparatory they may be and however cogently they may indicate an intention of thereafter smuggling or clandestinely introducing, at best are but steps or attempts not alone in themselves constituting smuggling or clandestine introduction. From the second, it results that as the words, "without paying or accounting for the duty" imply the existence of the obligation to pay or account at the time of the commission of the offence, which duty is evaded by the guilty act, it follows that the offence is not committed by an act done before the obligation to pay or account for the duties arises, although such act may indicate a future purpose to evade when the period of paying or securing the payment of duties has been reached. If this were not a correct construction of the statute, it would result that the offence of smuggling or clandestine introduction might be committed as to goods, although entry of such goods had been made and all the legal duties had been paid before the goods had been unshipped. The soundness of the deductions which we have above made from the statute is abundantly demonstrated by the line of argument which it has been necessary to advance at bar to meet the dilemma which the contrary view necessarily involves. For, although it was contended that the offence was complete the moment the concealment existed when the ship arrived within the waters of the United States, it was yet conceded that if in legal time the duties were subsequently paid or secured, there would have been no offence committed. But the contention and the admission are completely irreconcilable, since if the subsequent act becomes necessary in order to determine whether an offence has been committed, it cannot in reason be said that the offence was complete and had been committed before the subsequent and essential act had taken place.

These conclusions arising from a consideration of the text of the statute are rendered yet clearer by taking into view the definite legal meaning of the word "smuggling." That term had a well understood import at common law, and in the absence of a particularized definition of its significance in the statute creating it, resort may be had to the common law for the purpose of arriving at the meaning of the word. *Swearingen* v. *United States*, 161 U. S. 446, 451; *United States* v. *Wong Kim Ark*, 169 U. S. 649.

Russell, in his work on Crimes (Vol. I, p. 277, 6th English edition), thus speaks of the offence:

"Amongst the offences against the revenue laws, that of *smuggling* is one of the principal. It consists in bringing on shore, or carrying from the shore, goods, wares or merchandise, for which the duty has not been paid, or goods of which the importation or exportation is prohibited: an offence productive of various mischiefs to society."

This definition is substantially adopted from the opening sentence of the title "Smuggling and Customs" of Bacon's Abridgment, and in which, under letter F, it is further said:

"As the offence of smuggling is not complete unless some goods, wares or merchandise are actually brought on shore or carried from the shore contrary to law, a person may be guilty of divers practices which have a direct tendency thereto, without being guilty of the offence.

"For the sake of preventing or putting a stop to such practices, penalties and forfeitures are inflicted by divers statutes; and indeed it would be to no purpose, in a case of this kind, to provide against the end, without providing at the same time against the means of accomplishing it."

So also Blackstone defines smuggling to be "the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise" (4 Black. Com. 154), the words "importing without paying the duties" obviously implying the existence of the obligation to pay the duties at the time the offence is committed, and which duty to pay is evaded by the commission of the guilty act.

A reference to the English statutes sustains the statement

of the text writers above quoted, that the words "smuggling" and "clandestine introduction," so far at least as respected the introduction of dutiable goods from without the kingdom, signified the bringing of the goods on land, without authority of law, in order to evade the payment of duty, thus illegally crossing the line of the customs authorities. Thus, in 1660, by statute 12 Car. II, c. 4, sec. 3, dutiable goods were to be forfeited if brought into any port, etc., of the kingdom and "unshipped to be laid on land" without payment of duties, etc. So, in 1710, by statute 8 Anne, c. 7, sec. 17, dutiable goods "unshipped with intention to be laid on land" without the payment of duties, etc., were to be forfeited, treble the value of the goods was to be forfeited by those concerned in such unshipping, and the vessels and boats made use of "for landing" were also to be forfeited. In 1718, by statute 5 Geo. I, c. 11, entitled "An act against clandestine running of uncustomed goods, and for the more effectual preventing of frauds relating to the customs," provision was made in the fourth section for the seizure and forfeiture of goods concealed in ships from foreign parts "in order to their being landed without payment of duties;" and in section 8 ships of a certain burthen, laden with customable and prohibited goods, hovering on the coasts "with intention to run the same privately on shore," might be boarded, and security exacted against a violation of the laws. In 1721, by statute 8 Geo. I, c. 18, a forfeiture of twenty pounds was imposed upon those receiving or buying any goods, etc., "clandestinely run or imported," before legal condemnation thereof, knowing the goods to have been clandestinely run or imported into the kingdom; while in 1736, by statute 9 Geo. II, c. 35, sec. 21, watermen, etc., employed in carrying goods, "prohibited, run, or clandestinely imported," and found in possession of the same, were to forfeit treble the value of the same; and by section 23 of the same statute penalties were provided to remedy the evil recited in the preamble of unshipping goods at sea, without the limits of any port, "with intent to be fraudulently landed in this kingdom." In 1786, by statute 26 Geo. III, c. 40, sec. 15, bond was required to be given by the master and mate of a

vessel before clearing the vessel for foreign parts, not "to land illegally any goods, or take on board any goods with that intent." In 1762, by statute 3 Geo. III, c. 22, the object of the statute, as recited in the title, was, among other things, "for the prevention of the clandestine running of goods into any part of his majesty's dominions;" while the preamble of the first section recited the advisability of increasing the share of customs and excise officers in forfeited goods so that they should have "equal encouragement to be vigilant in the exertion of their duty, to suppress the pernicious practice of smuggling;" and in the fourth section, "for the more effectual prevention of the infamous practice of smuggling," provision was made looking to the proper distribution among the officers and seamen of public vessels and ships of war of the moiety allowed of the proceeds of goods, etc., seized and condemned.

The statutes just referred to and cognate statutes make it clear, as said above in the passage cited from Bacon's Abridgment, although they contained no express penalty for smuggling *eo nomine*, that the aim was to prevent smuggling, and that to accomplish this result every conceivable act which might lead up to the smuggling of dutiable goods, that is, their actual passage through the lines of the custom house without paying the duty, and every possible act which could follow the unlawful landing, was legislated against, and each prohibited act made a distinct and separate offence, entailing in some cases forfeiture of goods and in others pecuniary penalties and criminal punishments, the forfeitures and punishments varying in nature and extent according as it was deemed that the particular offence to which they were applied was of minor or a heinous character, (such as armed resistance to customs officers,) or was calculated to bring about the successful smuggling of the goods, and so defraud the revenue and cause injury to honest traders. Hence it is, that although the statute law of England made it clear that smuggling was the clandestine landing of the goods within the kingdom in violation of law, Parliament sought to prevent its commission, not by the specific punishment of smuggling, but by legislation

aimed at all acts which could precede or follow the consummation of the unlawful landing of the goods. In other words, the statutes establish not only what was meant by smuggling, but, to use the language of Bacon, also make it certain that provision against the "end," smuggling, was made by the enactment of numerous distinct and separate offences "against the means of accomplishing it."

This theory upon which the English law rested is indicated by a statute enacted in 1558, 1 Eliz. c. 11. The statute contained twelve sections, and provided specific and distinct penalties for various acts tending to lead up to the carrying from English soil of goods prohibited to be exported, and the introduction by clandestine landing of goods prohibited to be imported or of customable goods without the payment of duties thereon. Numerous provisions of the same nature are contained in a statute, consisting of thirty-eight sections, enacted in 1662, 13 and 14 Car. II, c. 11. Other statutes may be found referred to in 6 Geo. IV, (1825,) c. 105, which specifically and separately refers to 442 statutes, and repeals so much and such parts thereof "as relate to the trade and navigation of this kingdom, or to the importation and exportation of goods, wares and merchandise, or as relate to the collection of the revenue of customs or prevention of smuggling."

The distinction between smuggling — the ultimate result — and the various means by which it might be accomplished or by which its accomplishment could be made beneficial, is aptly shown by the recital of a statute enacted in 1736, 9 Geo. II, c. 35, by which all penalties and forfeitures were remitted which had before a date named in the act been incurred "in, by, or for the clandestine running, landing, unshipping, concealing or receiving any prohibited goods, wares, or merchandise, or any foreign goods liable to the payment of the duties of customs and excise, or either of them, and who are or may be subject to any information or other prosecution whatsoever for the duties of such goods, or for the penalties for the running, landing, unshipping, concealing or receiving thereof," as also for many other offences specifically enumerated which had been enacted with the object of preventing the illegal

exportation of goods or the importation of prohibited goods or the illegal landing of customable goods. And it is highly suggestive to observe that the modern English statutes serve but to make clear the purport of the English revenue laws from the beginning concerning the smuggling of dutiable goods. By the statute of 1876 to consolidate the customs laws, 39 and 40 Vict. c. 36, in a subdivision headed, "As to the restrictions on small craft and the regulations for the prevention of smuggling," it was made a specific offence, by section 186, to "import or bring, or be concerned in importing or bringing into the United Kingdom any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, *whether the same be unshipped or not.*" While the bringing of dutiable goods within the jurisdiction of Great Britain, that is, into the waters of the kingdom, with an intent to smuggle or clandestinely introduce the same was not declared to be punishable, in the same section, immediately following the quoted clause, it was made an offence to "unship, or assist or be otherwise concerned in the unshipping of . . . any goods liable to duty, the duties for which have not been paid or secured." In other words, this statute demonstrates that where goods might by law be introduced into the kingdom on paying duties, a violation of the obligation to pay the duties was not committed by the mere entry of the vessel into the waters of the kingdom before the period for the payment or securing the payment of the duties had arisen.

A review of the principal statutes enacted in this country regulating the collection of customs duties establishes that so far as they embraced legislation designed to prevent the evasion of duties they proceeded upon the theory of the English law on the same subject, that is, that they forbade all the acts which were deemed by the lawmaker means to the end of smuggling or clandestinely introducing dutiable goods into the country in violation of law, and which were likewise considered as efficient to enable the offender to reap the expected benefits of his wrongful acts. Therefore, they forbade and prescribed penalties for everything which could precede

smuggling or follow it, without specifically making a distinct and separate offence designated smuggling or clandestine introduction.

The act of July 31, 1789, c. 5, 1 Stat. 29, was entitled "An act to regulate the collection of the duties imposed by law on the tonnage of ships or vessels and on goods, wares and merchandises imported into the United States." The act consists of forty sections, and among other things establishes ports of entry and delivery. By section 10 masters of vessels from foreign ports were required to deliver a manifest of the cargo to any officer who should first come on board; by section 11 the master, etc., was required within forty-eight hours after arrival of the vessel within any port of the United States, etc., to make entry, and also make oath to a manifest, and a forfeiture of $500 was imposed for each refusal or neglect; by section 12 goods unladen in open day or without a permit — except in case of urgent necessity — subjected the vessel, if of the value of $400, and the goods to forfeiture, and the master or commander of the vessel "and every other person who shall be aiding or assisting in landing, removing, housing or otherwise securing the same" were to forfeit and pay $400 for each offence, and were disabled for the term of seven years from holding any office of trust or profit under the United States; by section 22 goods fraudulently entered by means of a false invoice were to be forfeited; by section 24 authority was given to customs officials to make search of ships or vessels, dwelling-houses, etc., for dutiable goods suspected to be concealed, which when found were to be forfeited; by section 25 persons concealing or buying goods, wares or merchandise, knowing them to be liable to seizure under the statute, were to "forfeit and pay a sum double the value of the goods so concealed or purchased;" and by section 40 dutiable goods of foreign growth or manufacture brought *into the United States* except by sea and in certain vessels and landed or unladen at any other place than where permitted by the act, were to be forfeited, together with the vessels conveying them; and it was further provided that "all goods, wares and merchandise brought *into the United States* by land con-

trary to this act should be forfeited, together with the carriages, horses and oxen that shall be employed in conveying the same."

The act of August 4, 1790, c. 35, 1 Stat. 145, consists of seventy-five sections, and repealed the act of 1789, c. 5. The act was entitled "An act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of ships or vessels." The provisions of the prior act were substantially reënacted. Further offences were also defined, some of which only will now be referred to. Thus, by section 10, when imported goods were omitted from or improperly described in a manifest, the person in command of the vessel was subjected to a forfeiture of the value of the goods so omitted; by section 12 a penalty of not to exceed $500 was declared for the failure on arrival within four leagues of the coast, etc., to produce upon demand to the proper officer a manifest and furnish a copy of the same, or to refuse to give an account of or to make a false statement as to the destination of the ship or vessel; by section 13 a penalty of $1000 and forfeiture of goods was authorized for unlading goods before a vessel should come to the proper place for the discharge of her cargo and until the unshipping had been duly authorized by a proper officer of the customs; by section 14 vessels in which goods were so unladen were subjected to forfeiture and the master was to forfeit treble the value of the goods; by section 28 goods requiring to be weighed or gauged in order to ascertain the duties due thereon, if removed from the wharf or place upon which landed, without permission, were subjected to forfeiture; by section 30 inspectors were authorized to be kept on board of vessels until they were unladen, and among other duties specified enjoined upon such inspectors was one that they were not to "suffer any goods, wares or merchandise to be landed or unladen from such ship or vessel without a proper permit for that purpose;" by section 66 masters of vessels or others who should take a false oath were made liable to a fine of $1000 and to be imprisoned for not exceeding twelve months; and by section 23 manifests

under oath were required to be furnished by vessels bound to a foreign port, and the person in charge of the vessel departing without so clearing was to forfeit $200.

The act of March 2, 1799, c. 22, 1 Stat. 627, was entitled "An act to regulate the collection of duties on imports and tonnage." It consisted of 112 sections, repealed the act of 1790, c. 35, and substantially reënacted the provisions of that act, though amplifying those provisions, particularly by the insertion of forms of manifests, entries, certificates, etc. By section 32 the master in charge of a vessel in which had been brought goods destined for a foreign port was required, before departing from the district in which he first arrived, to give bond "with condition that the said goods, wares or merchandise, or any part thereof, *shall not be landed* within the United States, unless due entry thereof shall have been first made, and the duties thereupon paid, or secured to be paid according to law." In section 46 provision was made for the entry of baggage and mechanical implements, which were exempted from duty, and for the examination of such baggage; the section ending as follows:

"*And provided*, that whenever any article or articles subject to duty, according to the true intent and meaning of this act, shall be found in the baggage of any person arriving within the United States, which shall not, at the time of making entry for such baggage be mentioned to the collector before whom such entry is made by the person making the same, all such articles so found shall be forfeited, and the person in whose baggage they shall be found shall moreover forfeit and pay treble the value of such articles."

This proviso, it may be stated, has ever since remained on the statute books, being now section 2802 of the Revised Statutes.

By sections 49 and 62 of the act of 1799, entry was required to be made and duties paid or secured to be paid before permission to land goods, wares and merchandise should be granted; by section 103, provision was made as to vessels and packages in which certain articles were thereafter to be imported, a violation to entail a forfeiture of the vessel and

goods; by section 105 and succeeding sections authority was given to import goods and merchandise into districts established and to be established on the northern and northwestern boundaries of the United States, and on the rivers Ohio and Mississippi, "in vessels or boats of any burthen, and in rafts or carriages of any kind or nature whatsoever;" and like report was to be made, like manifests furnished, and entry made as in the case of goods imported into the United States in vessels from the sea, and except as specially provided in the act such importations were to be subject to like regulations, penalties and forfeitures as in other districts.

The requirements as to the production of invoices upon entry of goods subject to an *ad valorem* duty were supplemented by acts of April 20, 1818, c. 79, 3 Stat. 433, and March 1, 1823, c. 21, 3 Stat. 729, which later statute was enacted to take the place of the former, then about to expire by limitation. Original invoices were required to be furnished as a prerequisite to an entry; specific provisions were enacted as to the manner of making entry; in the case of non-residents invoices were required to be verified by the oath of the owner, unless such requirement was dispensed with by the Secretary of the Treasury; and the appointment of appraisers was provided for and the procedure by which the true value of goods was to be determined set forth; and a number of offences relating to the subject declared.

When the act of 1842, heretofore referred to, was enacted, the provisions of the act of 1799, as amended or supplemented by the act of 1823, were, in the main, in force, as they still are.

As we have seen, it was not until 1842 that a specific penalty for smuggling or clandestine introduction, *eo nomine*, was enacted. When the significance of the word "smuggling," as understood at common law, is borne in mind, and the history of the English legislation is considered and the development of our own is brought into view, it becomes manifest that the statute of 1842 was not intended to make smuggling embrace each or all of the acts theretofore prohibited which could precede or which might follow smug-

gling, and which had been legislated against by the imposition of varying penalties; in other words, that it had not for its purpose to cause the means to become the end, but to supplement the existing provisions against the means leading up to smuggling, or which might render it beneficial, by a substantive and criminal statute separately providing for the punishment of the overt act of passing the goods through the lines of the customs authorities without paying or securing the duties; that is, the statute was intended not to merge into one and the same offence all the many acts which had been previously classified and punished by different penalties, but to legislate against the overt act of smuggling itself. And this view makes clear why it was that the statute of 1842 related not generally to acts which precede smuggling or which might follow it, but to the concrete offence of smuggling alone. That this was the purpose which controlled the enactment of the act is cogently manifested by the use of the words "clandestinely introduce," since they, in the common law, were synonymous with smuggling. Indeed, in the English statutes the word "smuggling" and clandestine importation, clandestine running and landing, were constantly made use of, one for the other, as purely convertible terms, all relating to the actual passing of the goods across the line where the obligation to pay the duty existed, and which passing could not be accomplished except in defiance of the duty which the law imposed. The inference that the common law meaning of the word "smuggling" is to be implied, is cogently augmented by the fact that the statute also uses in connection with it words generally known in the law of England as a paraphrase for smuggling. In reason this is tantamount to an express adoption of the common law signification. Moreover, this view is fortified by the concluding portion of the statute which supplements the smuggling or clandestine introduction, by imposing a similar penalty upon every person who "shall make out or pass, or attempt to pass, through the custom house, any false, forged or fraudulent invoice;" all of which were acts connected with the actual entry of the goods, which, if the object intended to be accomplished was effected, would

result in the successful introduction of the goods into the country, without payment, in part at least, of the duties required by law. This relation of the act of 1842 to the then existing legislation and the remedy intended to be accomplished thereby were referred to and elucidated by the court in *United States* v. *Sixty-seven Packages of Dry Goods*, 17 How. 85. In that case, after observing that the provision making criminal the passing or attempting to pass goods through the custom house by means of false, forged or fraudulent invoices (now a part of section 2865) was manifestly directed against the production and use of simulated invoices and those fraudulently made up for the purpose of imposing upon the officers in making the entry, the court said (p. 93):

"The whole scope of the section confirms this view. It first makes the smuggling of dutiable goods into the country a misdemeanor; and, secondly, the passing or attempt to pass them through the custom house, with intent to defraud the revenue, by means of false, forged or fraudulent invoices; the latter is an offence which, in effect and result, is very much akin to that of smuggling, except done under color of conformity to the law and regulations of the customs."

It was then, therefore, in effect declared that the smuggling or clandestine introduction of dutiable goods into the United States with intent to defraud the revenue of the United States, against which the act of 1842 provided, was an act committed by passing the goods in defiance of and without conformity to the laws and regulations of the customs, or by preparing, attempting or actually passing the same through the custom house by means of false or fraudulent invoices.

The fact that the smuggling or clandestine introduction into the United States referred to in the act of 1842 had substantially the foregoing significance, is also shown by the case of *United States* v. *Jordan*, 2 Lowell, 537, (1876,) where Lowell, J., in considering the act of 1842 and other statutes, said:

"Under these statutes, smuggling, or bringing in, or introducing goods, has been held by both the Circuit and District Courts for this district for a long course of years to be proved by evidence of the secret landing of goods, without paying or

securing the duties, which, according to the argument here, would be quite inadmissible, if the importation in the sense contended for had no element of concealment about it. I have never known a case of smuggling in which any concealment on board the vessel was relied on by the Government. The gist of the offence is the evasion or attempted evasion of the duties, and they, to be sure, are due when the vessel arrives; but they are not payable until some time after, and it is the default in paying which is the fraud, or in omitting the acts which immediately precede the payment. . . . A bringing on shore without making entry, etc., is part of the importation or introduction of the goods, and makes it illegal."

It was earnestly contended in the argument at bar that the successful administration of the revenue laws would be frustrated unless the pains and penalties of smuggling be held to be applicable to all unlawful acts antecedent to the actual introduction of the goods into the United States. But this argument amounts only to the contention that by an act of judicial legislation the penalties for smuggling should be made applicable to a vast number of unlawful acts not brought within the same by the lawmaking power. And the result would be to control all acts done in violation of the revenue laws by a highly penal criminal statute, although the law has classified them into many distinct offences according to their gravity and imposed different penalties in one case than in others.

The contention that because the portion of the act of 1842, now found in section 2865, was omitted in the revision, and was only reënacted in 1877, therefore its language should be given a wider meaning than was conveyed by the same words when used in the act of 1842, is without merit. When the reenactment took place the act of 1842 in the particular in question had been considered by this court and had been enforced in the lower courts as having a specific purpose and meaning. The reënactment without change of phraseology, by implication, carried the previous interpretation and practice with it. Indeed, the reënactment of the provisions of the act of 1842 is the best indication of the judgment of Congress that the

portion of the statute restored should not have been dropped in the revision, and that its meaning should stand as though it had never been so omitted, but had always continued to exist.

It is settled that the rate of customs duty to be assessed is fixed by the date of importation and is not to be determined by the time when entry of the merchandise is made. But this throws no light on the meaning of the word "smuggling," since that word, both at common law and under the text of the acts of Congress, is an act by which the goods are introduced without paying or securing the payment of the duties, and hence concerns, not the mere assessment of duty, but the evasion of a duty already assessed, by passing the line of the customs authorities in defiance of law.

There remains only one further contention for consideration, that is, the assertion that, whatever may have been the meaning of the term "smuggling" at common law and its significance at the time when the statute of 1842 was adopted, that word as now found in section 2865 of the Revised Statutes is to have a more far-reaching significance, because it must be interpreted by the meaning affixed to the word in section 4 of the anti-moiety act of June 22, 1874, c. 391, 18 Stat. 186. The section relied on is as follows:

"SEC. 4. That whenever any officer of the customs or other persons shall detect and seize goods, wares or merchandise, in the act of being smuggled, or which have been smuggled, he shall be entitled to such compensation therefor as the Secretary of the Treasury shall award, not exceeding in amount one half of the net proceeds, if any, resulting from such seizure, after deducting all duties, costs and charges connected therewith: *Provided*, That for the purposes of this act smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination." . . .

It suffices to say in answer to this contention that if the

anti-moiety act had the meaning claimed for it, by the very terms of that act such meaning was restricted to "the purposes" of that act alone. That statute had in view the reward to be reaped by informers under the revenue laws of the United States, and the words, "for the purposes of this act," can in reason only be construed as contemplating a more enlarged construction of the word "smuggling," for the purpose of stimulating efforts at detecting offenders against the revenue laws, and cannot be held applicable, in the absence of the clearest expression by Congress of a contrary intent, to a different and criminal statute. Indeed, if the word "smuggling" in the act of 1842 embraced, as asserted, every unlawful act which might lead up to smuggling, then the explanatory words found in the anti-moiety act would be wholly superfluous. Their insertion in the statute was evidently, therefore, a recognition of the fact that smuggling had at the time of the passage of the anti-moiety act a defined legal and restricted significance, which it was the intent of Congress to enlarge for a particular purpose only, and which enlargement would be absolutely without significance if the term before such enlargement had meant exactly what Congress took pains to state it intended the word should be construed, as meaning for the exceptional purposes for which it was legislating.

Examining the case made by the record, in the light of the foregoing conclusions, it results that, whether we consider the testimony of the captain alone or all the testimony contained in the record, as it unquestionably establishes that there was no passage of the packages of diamonds through the lines of the customs authorities, but that on the contrary the package was delivered to the customs officer on board the vessel itself, at a time when or before the obligation to make entry and pay the duties arose, that the offence of smuggling was not committed within the meaning of the statute, and therefore that the court erred in instructing the jury that if they believed the testimony of the captain they should convict the defendant and in refusing the requested instruction that the jury upon the whole testimony should return a verdict for

the defendant. This conclusion renders unnecessary a consideration of the other questions of alleged error discussed in the argument at bar.

The judgment must therefore be reversed and the case remanded with directions to set aside the verdict and grant a new trial.

MR. JUSTICE BROWN, with whom were the CHIEF JUSTICE, MR. JUSTICE HARLAN and MR. JUSTICE BREWER, dissenting.

I find myself unable to concur in the opinion of the court in this case, and particularly in a definition of smuggling, which requires that the goods shall be actually unladen and carried upon shore.

This definition rests only upon the authority of Hawkins' Pleas of the Crown, (A.D. 1716,) repeated in Bacon's Abridgment, (A.D. 1736,) and copied into Russell on Crimes, (A.D. 1819,) and Gabbet's Criminal Law, a work but little known. The diligence of counsel has failed to find support for it in a single adjudicated case in England or this country. If it were ever the law in England, it never found a lodgement in its standard dictionaries, either general or legal, and has never been recognized as such by writers upon criminal law, with the exceptions above stated. It was never treated as the law in America. The truth seems to be that smuggling *eo nomine* was formerly, whatever it may be now, not a crime in England, but a large number of acts leading up to an unlawful unlading of goods were made criminal. Smuggling appears to have been rather a popular than a legal term, and the fact that it was usually accompanied by the landing of goods on shore may have led to the definition made use of by Bacon and Hawkins. Indeed, in all the old English statutes cited in the opinion of the court it is recognized that the ultimate object of all smugglers is to get their goods ashore without payment of duties.

If, as stated by these authors, the actual unlading and carriage of the goods to the shore were an essential ingredient of the offence, it is somewhat singular that it should have escaped

the notice of so learned a writer as Sir William Blackstone, who defines it in accordance with the views of the other writers upon the subject as "the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise." 4 Bl. Com. 154. Dr. Johnson, with his customary disregard of conventionalities, defines the verb "to smuggle" as "to import or export goods without paying the customs," and a smuggler as "a wretch who, in defiance of justice and the laws, imports or exports goods, either contraband or without paying the customs." In Burns' Law Dictionary, (1792,) smugglers are said to be "those who conceal prohibited goods and defraud the King of his customs on the seacoast by running of goods and merchandise." In Brown's Law Dictionary, (Eng. 1874,) smuggling is defined as "importing goods which are liable to duty so as to evade payment of duty;" and in McClain's Criminal Law, (sec. 1351,) as importing dutiable goods without payment. There are similar definitions in the Encyclopædia and also in the Imperial Dictionary. In the Encyclopædia Britannica "smuggling" is said to denote "a breach of the revenue laws, either by the importation or the exportation of prohibited goods, or by the evasion of customs duties on goods liable to duty;" and Stephen, in his Summary of the Criminal Law, p. 89, defines smuggling as the "importing or exporting of goods without paying the duties imposed thereon by the laws of customs and excise, or of which the importation or exportation is prohibited." Similar definitions are given by Lord Hume in his Commentaries on the Laws of Scotland, as well as in Bell's Dictionary of Scottish Law, p. 225. In Tomlin's Law Dictionary, where smuggling is defined as "the offence of importing or exporting goods without paying the duties imposed thereon by the custom or excise laws," a list of some thirty or forty acts connected with the unlawful and fraudulent importation of goods is given, but in none of them is the word "smuggle" mentioned as an offence. In the sixth edition of his work on Crimes, Sir William Russell gives as his authority for the definition Hawkins, Bacon and Blackstone, the last of whom is against him, and also sets forth a large number of acts "for the prevention of

smuggling," passed during the present reign, none of which mention the word "smuggle" as a distinct crime. Indeed, the word seems to be a popular summing up of a large number of offences connected with the clandestine introduction of goods from foreign ports.

But conceding, all that is claimed as to the law of England in that particular, the question is not what was the law of England during the last century, nor what it is to-day, but what was the law of the United States in 1842 when this act was passed, and in 1877 when it was incorporated in the Revised Statutes? If we are to rely for a definition upon our lexicographers and legal grammarians, there can be no doubt upon the subject, as by Webster, Worcester, the Century and the Standard Dictionaries, and in all the law lexicons, the offence is defined in somewhat varied phraseology as the clandestine importation of goods without the payment of duties. I know of no American authority, except the dictum of Judge Lowell in *United States* v. *Jordan*, 2 Lowell, 537, to the contrary.

It would seem from that case and from certain expressions in the opinion of the court in the case under consideration, that the offence is not complete even when the goods are unladen and put upon the shore, and that a failure to pay duty upon them is a necessary element to justify an indictment, or that, as the words "without paying or accounting for the duty," imply the existence of the obligation to pay or account at the time of the commission of the offence, which duty is evaded by the guilty act, it follows that the offence is not committed by an act done before the obligation to pay or account for the duties arises, although such act may indicate a future purpose to evade when the period of paying or securing the payment of duties has been reached. It follows from this that if, as is the custom upon the arrival of trans-Atlantic steamers, a passenger's baggage is landed upon the wharf, and the trunks are filled with goods clandestinely imported, the owner cannot be convicted of smuggling them under this statute, since the obligation to pay the duties upon them does not arise until an attempt is made to carry them off the wharf.

Dissenting Opinion: Brown, J., Fuller, C.J., Harlan, Brewer, JJ.

In my view the act of smuggling is complete when the goods are brought within the waters of a certain port, with intent to land them without payment of duties. Whether, if the duties be subsequently paid, such payment would be a condonation of the offence is a question upon which it is unnecessary to express an opinion. It might depend upon the motives which induce the importer to pay the duties. If they were paid after detection, it might not be considered sufficient; if before detection it would be strong evidence of a change of purpose. If the testimony of the captain in this case is to be believed, he brought the package of diamonds into port wholly ignorant of the fact that it contained dutiable articles. Defendant himself was not on board the steamer, but took passage on another ship to arrive later at another port, thus putting it out of his power to pay or account for the duty. The guilty intent with which the package was delivered in Antwerp to an innocent party for transportation to this country must be held to have continued, since defendant had deliberately deprived himself of any *locus penitentiæ* by handing the package to the captain for transportation and delivery.

But we think it is unnecessary to look beyond the language of the statute itself to determine what is meant by the word "smuggle," since it is there defined as the clandestine introduction into the United States of "any goods, wares or merchandise subject to duty by law, and which should have been invoiced, without paying or accounting for the duty." If the words "clandestinely introduce" are not intended as a definition of the prior word "smuggle," they are intended as a separate offence, and in either case the defendant would be liable if he clandestinely introduced the goods without paying or accounting for the duty thereon. What then is meant by a clandestine introduction? In at least two cases in this court, *United States* v. *Vowell*, 5 Cranch, 368; *Arnold* v. *United States*, 9 Cranch, 104, an "importation" to which the government's right to duty attaches was defined to be an arrival within the limits of some port of entry. Or, as stated by Mr. Justice Curtis in *United States* v. *Ten Thousand Cigars*, 2 Curtis, 436, "an importation is complete when the goods are

brought within the limits of a port of entry with the intention of unlading them there." A similar definition of an importation is given in the following cases: *Harrison* v. *Vose*, 9 How. 372, 381; *United States* v. *Lyman*, 1 Mason, 499; *McLean* v. *Hager*, 31 Fed. Rep. 602, 606; *The Schooner Mary*, 1 Gallison, 206, wherein it was said by Mr. Justice Story that "an importation is a voluntary arrival within some port with intent to unlade the cargo."

Such being the meaning of the word "import," a clandestine importation would be the bringing of goods into a port of entry with design to evade the duties. Should a narrower meaning be given to the words "clandestinely introduce"? I think not. The word "introduce" would strike me as entitled to an even broader meaning than the word "import." To introduce goods into the United States is to fetch them within the jurisdiction of the United States, or at least within some port of entry, and the requirement that they should be unladen or brought on shore is to import a feature which the ordinary use of language and the object of the act does not demand. If the construction of the words "clandestinely introduce" adopted by the court be the correct one, it would follow that a vessel loaded with goods, which the owner designed to import without payment of duty, leaving a European port, might be navigated up the St. Lawrence and through the chain of Great Lakes to Chicago, (a voyage by no means unknown,) or up the Mississippi to St. Louis, and be moored to a dock, and yet the goods be not introduced into the United States, because not actually unladen upon the wharf. I cannot give my consent to such a narrow definition.

Confirmation of the above meaning of the word "smuggle" may, I think, be found in the act of June 22, 1874, c. 391, 18 Stat. 186, commonly known as the "anti-moiety act." In section 4 of that act it is provided that the Secretary of the Treasury shall award to officers or others detecting or seizing smuggled goods a proportion of their proceeds, and that "for the purposes of this act smuggling shall be construed to mean the act with intent to defraud or bringing into the United States, or with like intent attempting to bring into the United

Counsel for Parties.

States, dutiable goods without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination." It is true the definition is given "for the purposes of this act," and evidently with the object of including within its provisions not only the act of smuggling proper, that is, the act of importing with intent to defraud dutiable articles without passing, etc., but of an *attempt* to do the same, which would probably not be construed as smuggling under the provisions of other acts. It is scarcely possible that Congress should have contemplated wholly different interpretations of the same words in different acts.

But it is useless to prolong this discussion. The whole question turns upon the meaning of the words "smuggle" and "clandestinely introduce." I have given my reasons for believing that they include an importation of goods with an intent to evade the duties — the right to which has already attached — and I am at a loss to understand why an obsolete definition of the English law should be rehabilitated to defeat the manifest intention of Congress.